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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1998

NEC CORPORATION and
HNSX SUPERCOMPUTERS, INC.,

Petitioners,

v.

UNITED STATES AND DEPARTMENT OF COMMERCE,

Respondents,

and

CRAY RESEARCH, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Due Process Clause of the Fifth Amendment, the standard for disqualifying an administrative decisionmaker alleged to have prejudged questions of adjudicative fact requires the challenging party to prove that the decisionmaker's mind is "irrevocably closed," as the Federal Circuit held in the present case, or whether disqualification is required whenever "a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it," as the District of Columbia, Sixth, Eighth, and Tenth Circuits have held.

PARTIES

The parties in the courts below are as follows:

Plaintiffs-Appellants:	NEC Corporation and HNSX Supercomputers, Inc.
Defendants-Appellees:	United States; Department of Commerce; and Cray Research, Inc.

The plaintiffs-appellants in the court below are petitioners in this Court. The defendants-appellees in the Court below are respondents in this Court.

RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of this Court:

1. NEC Corporation states that its publicly-held affiliates are: NEC Systems Integration & Construction, Ltd.; Ando Electric Company, Limited.; Japan Aviation Electronics Industry, Limited.; Tokin Corporation; Toyo Communication Equipment Co., Ltd.; Nippon Avionics Co., Ltd.; Nippon Electric Glass Co., Ltd.; Nippon Electric Industry Co., Ltd.; Nitsuko Corporation; Anritsu Corporation; Tama Electric Co., Ltd.; Nippon Computer System Co., Ltd.

2. HNSX Supercomputers, Inc. states that it is an indirect, wholly-owned subsidiary of NEC Corporation, and does not have any nonwholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners NEC Corp. and HNSX Supercomputers, Inc. (collectively "NEC") respectfully request that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit rejecting NEC's request to enjoin the Department of Commerce ("Commerce" or "DOC") from enforcing an antidumping order based upon adjudicative facts regarding NEC's supercomputer imports which Commerce was alleged to have prejudged. NEC had sought such relief under the Due Process Clause, because the Secretary of Commerce and certain of his key subordinates, acting in response to political pressures and outside their statutory mandate to administer the antidumping laws — and before an antidumping petition had been filed — had informed senior White House officials, other Executive Branch agencies, DOC's Congressional oversight committees, and the general public that NEC was guilty of "dumping" supercomputers.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reported at 151 F.3d 1361 and is reproduced in the Appendix ("App.") to this Petition, at App. 1a-32a. The opinion of the United States Court of International Trade is reported at 978 F. Supp. 314, and appears at App. 33a-76a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is being filed within 90 days of August 7, 1998, the date on which the Court of Appeals entered judgment.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the application of the Fifth Amendment (Due Process Clause) of the United States Constitution, reproduced at App. 77a.

STATEMENT OF THE CASE

Summary

In the Spring and Summer of 1996, the Department of Commerce succeeded in preventing a federally-funded research consortium, the University Corporation for Atmospheric Research ("UCAR"), from purchasing supercomputers manufactured by NEC Corporation of Japan ("NEC"). As part of that effort, high-ranking DOC officials, acting with the express approval of the Secretary of Commerce, informed the White House, other Executive Branch agencies, DOC's Congressional oversight committees, UCAR, and the general public that Commerce had analyzed NEC's offer to UCAR, and had determined that it involved very substantial "dumping," *i.e.*, sale of an imported product at a price below fair market value. These pronouncements of NEC's guilt were made wholly outside the context of any proceeding authorized by the antidumping laws.

Subsequent to DOC's intervention in the UCAR procurement, a private party, Cray Research Inc. ("Cray"), filed a petition under the antidumping laws alleging substantial dumping in connection with the offer of NEC supercomputers to UCAR. Commerce initiated a dumping proceeding and ultimately entered an antidumping order finding NEC guilty of dumping at the rate of 454 percent.

In view of DOC's actions prior to the initiation of the investigation, NEC raised a due process objection, and sought the appointment of an unbiased decisionmaker to conduct the antidumping proceeding, initially through a request to Commerce and subsequently through an action filed with the Court of International Trade. These requests were denied. The Federal Circuit acknowledged that NEC had run into a "high-level political buzz-saw apparently motivated by a

desire to protect a domestic industry," but nonetheless affirmed on the ground that NEC had not established by clear and convincing evidence that the minds of the responsible DOC officials were "irrevocably closed."

A. Commerce's Unprecedented Dissemination of Dumping Findings Outside the Context of an Antidumping Investigation

On May 20, 1996, the day that UCAR announced its intention to procure NEC supercomputers, Paul Joffe, the Acting Assistant Secretary for Import Administration and the senior Commerce official responsible for the administration of the antidumping laws, sent a letter to the National Science Foundation ("NSF") — the agency of the United States Government which was providing funding to UCAR (and whose approval was necessary for finalization of the transaction with NEC) — charging that NEC's offer involved dumping. According to Joffe:

> Using standard dumping methodology prescribed by the antidumping laws, we estimate that the cost of production of one of the foreign bidders is substantially greater than the funding levels projected by [UCAR's] request for proposals. In antidumping law terms, this means that the "dumping margin," . . . is likely to be very high.

(App. at 6a). On the same day, Commerce faxed Mr. Joffe's letter to Cray, NEC's domestic competitor in the UCAR procurement, and released it to the media. (*Id.*). These unprecedented actions were taken with the express approval of Commerce Secretary Mickey Kantor. (App. 49a).

Also on May 20, 1996, Commerce sent NSF a second letter transmitting a copy of a document entitled "Predecisional Memorandum," which set forth DOC's detailed

"Dumping Analysis" of NEC's UCAR offer. This analysis described the methodology employed by Commerce, set forth its conclusion that NEC's offer to UCAR involved substantial dumping, and estimated the dumping margin at between 163.8% and 280%. (App. 6a). Commerce authorized release of the Predecisional Memorandum to UCAR and NEC, and it was soon disseminated beyond the initial recipients and eventually published in an international trade publication. (*Id.*).

DOC's May 20, 1996 intervention in the UCAR procurement was the culmination of a course of conduct designed to prevent the award of the UCAR supercomputer contract to NEC. Prior to its May 20 communications to NSF, Commerce had conducted interagency meetings on April 24, 1996 and May 13, 1996, with senior NSF officials present, to press its view that NEC's offer to UCAR involved dumping. (App. 4a). At the meeting on May 13, 1996, DOC's General Counsel, Susan Esserman, stated that a dumping finding by Commerce in the range of 100-300% could be made and successfully upheld on appeal. (App. 72a-73a). At a subsequent meeting at the White House on May 17, 1996, DOC's Under Secretary for International Trade and its General Counsel informed high-level officials from the White House and other executive agencies of DOC's conclusion that NEC was guilty of dumping.[1]

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[1] The CIT chose to downplay this meeting, omitting mention of several attendees and noting only that it involved "a short factual briefing of [sic] the UCAR Procurement and Import Administration's inquiry into this matter." (App. 47a). The substance of that briefing is evident, however, from the court's findings regarding DOC's characterization of the results of the Import Administration's inquiry, as presented to a group of lower-level officials four days earlier. (App. 72a-73a).

On three occasions during June 1996, Commerce defended the premature dissemination of its "Dumping Analysis" of the NEC-UCAR bid before skeptical audiences on Capitol Hill, including a meeting with staff members of the House Ways and Means Committee and the Senate Finance Committee, which oversee the administration of the antidumping laws. Robert LaRussa, who succeeded Mr. Joffe as Acting Assistant Secretary of Commerce for Import Administration on June 5, 1996, attended two of these meetings, including the meeting with the Ways and Means and Finance staff at which DOC described its Dumping Analysis in detail. (App. 51a-53a).

The campaign by Commerce to block the UCAR-NEC contract was successful; NSF refused to approve UCAR's request to negotiate a contract with NEC. DOC's use of the dumping laws to achieve this result was wholly unprecedented. As the Court of Appeals for the Federal Circuit acknowledged:

> NEC is not without grounds for feeling aggrieved. Presumably it entered into the competition for the UCAR contract on the supposition that the vendor with the best product for the lowest cost would win. Then it ran into a high-level political buzz-saw apparently motivated by a desire to protect a domestic industry. (App. 30a-31a).

DOC's assertions in May and June of 1996 to the White House, Congress, NSF, UCAR and the general public that NEC was guilty of substantial dumping occurred prior to the filing of the petitions which led to the initiation of the supercomputer antidumping investigation, and were entirely

extraneous to any proceeding, formal or informal, contemplated by the antidumping laws.[2]

B. DOC's Initiation of the Supercomputer Antidumping Investigation

Cray filed an antidumping petition with DOC and the International Trade Commission ("ITC") on July 29, 1996, in which it alleged that the offer of NEC supercomputers to UCAR involved dumping at very high levels — precisely the allegation that senior DOC officials had already endorsed as accurate. By letter of August 2, 1996, NEC asked the Commerce Under Secretary for International Trade to suspend any action on Cray's petition, pending a review by the Commerce Inspector General of the Department's conduct in

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[2] Initiation of a formal antidumping investigation is generally preceded by the filing of a petition by a U.S. industry seeking relief from dumping; on very rare occasions, Commerce itself will initiate an investigation. 19 U.S.C. § 1673a. When Commerce decides to initiate an investigation, it publishes a notice in the Federal Register. 19 C.F.R. § 351.203(c). Following initiation, Commerce conducts a formal proceeding to determine whether the imported merchandise is "dumped," *i.e.*, sold at less than normal value. 19 U.S.C. §§ 1673b, 1673d. Concurrently with the Commerce dumping investigation, the International Trade Commission determines whether the imports at issue are injuring, threatening to injure or retarding the establishment of a U.S. industry. 19 C.F.R. Part 210. If Commerce finds dumping and the ITC makes an affirmative determination, an antidumping order is published by Commerce, and antidumping duties are imposed on the imports. 19 U.S.C. § 1673e. While the trial court declined to consider NEC's contention that DOC's transmittal of the Predecisional Memorandum to NSF was *ultra vires*, because it would have required the court to inquire into DOC's motivation, the court did not find that such dissemination was authorized, much less required, by the antidumping statute. Rather, the court acknowledged that "the disclosure of the Predecisional Memorandum to NSF, NEC, UCAR and NCAR was for purposes of the procurement," (App. 51a), but nonetheless held Commerce's actions to be lawful on the basis of a 1985 opinion of the Justice Department's Office of Legal Counsel. (App. 68a-69a, n. 97).

connection with the UCAR procurement, including DOC's apparent prejudgment of the dumping issue. This request was summarily rejected, and an antidumping proceeding ("the Supercomputer Investigation") was initiated. (App. 8a-9a).

NEC subsequently filed an action in the Court of International Trade, invoking its Constitutional right to due process and seeking, *inter alia*, the appointment of a neutral, unbiased decisionmaker to preside over the Supercomputer Investigation. Pending a judicial ruling on this request, NEC advised Commerce that it would not participate in the DOC phase of the proceeding. (App. 56a-57a).

C. The Trial Court's Opinion

The Court of International Trade ("CIT") rejected NEC's claim that the Department of Commerce had impermissibly prejudged the outcome of the Supercomputer Investigation. In reaching this conclusion, the CIT held that NEC had no Constitutional right to due process in an antidumping proceeding. Noting that there is no *substantive* Constitutional right to engage in international trade, the court held that:

> NEC did not identify a specific Constitutionally protected interest at stake in the antidumping investigation. . . . [C]ases from the Supreme Court and the Federal Circuit seem to preclude recognition of a Constitutionally based prejudgment claim.

(App. 59a-60a).

The court also stated that NEC was not entitled to a full measure of Constitutional due process protection because "[a]ntidumping proceedings are not adjudicatory but investigatory . . .." (App. 66a) The court acknowledged that other courts have "require[d] recusal of a decisionmaker in an adjudicatory administrative proceedings [sic]," but held that "[t]he constitutionally driven concerns of formal adjudicatory

proceedings are not at issue in antidumping cases." (App 66a, n. 95).

In lieu of Constitutional due process, the CIT recognized "a statutorily based prejudgment claim . . . preclud[ing] only conduct by the decisionmaker that will render the statutory procedures a 'hollow formality.'" (App. 60a, 67a). (quoting *Association of Nat'l Advertisers v. United States*, 627 F.2d 1151, 1187 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980)). The CIT emphasized how demanding this standard is:

> Under this statutory scheme, a plaintiff must demonstrate more than the appearance of prejudgment to disqualify a decisionmaker. A plaintiff must show from the conduct and statements of the decisionmaker that the outcome of the investigation had already been determined and that plaintiff's participation in the administrative process would be futile.

(App. 67a). The CIT rejected NEC's contention that:

> The test for disqualification . . . [is] whether a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.

Cinderella Career and Finishing Sch. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) (internal quotation omitted). (App. 66a-67a). Thus, although it acknowledged the risk that the statements by senior DOC officials that NEC was guilty of dumping would "become[ ] a self-fulfilling prophecy" (App. 73a-74a), the CIT denied NEC's prejudgment claim because it had not been established by "clear and convincing proof"

that the outcome of the proceeding had necessarily been predetermined. (App. 67a, 44a-45a).[3]

D. The Federal Circuit's Opinion

The Court of Appeals for the Federal Circuit ("CAFC") declined to decide whether NEC was entitled to Constitutional due process, but held it sufficient to conclude that "NEC is due a fair and honest process" under the antidumping laws (App. 19a-20a).[4]

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[3] The trial court's application of this legal standard to the facts was highly convoluted. After arbitrarily restricting its analysis to only two of the numerous Commerce pronouncements that suggested prejudgment, the CIT focused solely on the decisional independence of Assistant Secretary LaRussa, ruling irrelevant any prejudgment by the members of his staff, upon whom the court had found Mr. LaRussa would necessarily rely (App. 63a-64a). The court also limited its analysis of the factors which might have affected Mr. LaRussa's objectivity to the impact of DOC General Counsel Esserman's May 13, 1996 statement to NSF that a dumping finding by DOC in the range of 100-300% could be made and successfully upheld on appeal. Because the court was unable to conclude "that Ms. Esserman's statement so constrained Mr. LaRussa as to lead to a pre-determined result," it dismissed NEC's claim. (App. at 74a).

[4] To the extent that the Federal Circuit's holding turns to any degree on the conclusion that NEC did not have a Constitutional right to due process, it is erroneous. This Court has held that the perquisite of a Constitutionally protected property interest is a

> legitimate claim of entitlement to it. . . . Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The antidumping statute meets the Court's description precisely: it comprises an "independent source" of "state law" that encompasses "rules" and "understandings" which, in turn, create a "legitimate claim of entitlement." Through the statute, Congress effectively permits NEC to import free of antidumping duties, unless and until the Department of Commerce follows statutorily mandated procedures to determine that it is dumping. *See* 19

Observing that the case was one of first impression in the circuit (App. 20a-21a),[5] the CAFC held that a party can prevail on a prejudgment claim involving an antidumping investigation only if it can establish that the decisionmaker is incapable of "judging a particular controversy fairly on the basis of its own circumstances." (App. 24a). The CAFC applied this standard in the strictest possible manner, requiring that a challenging party show that the decisionmaker's mind is "irrevocably closed." (*Id.*).[6] While noting that "NEC is not without grounds for feeling aggrieved," and that Commerce's conduct should not be "emulated," the CAFC held that DOC's pronouncement of NEC's guilt in at least five different settings did not meet this

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U.S.C. §§ 1673-1677. The statute thus creates a "legitimate claim of entitlement" that triggers rights of procedural due process. *See Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1, 11 (1987).

[5] In rejecting the "disinterested observer" standard advocated by NEC, the CAFC inexplicably chose to ignore the fact that other circuits had embraced that standard, and treated it as though it were NEC's invention of the moment:

> As an abstract proposition, NEC's proposed standard is a goal to which all government decision makers might aspire. However, as a practical matter, we are not persuaded that NEC's standard is the correct one when imposed on administrative agencies charged with the duty both to investigate and then judge.

(App. 20a-26a).

[6] Although the CAFC apparently believed that its "irrevocably closed mind" standard was less draconian than the Government's proposed standard, "that would require the plaintiff to show that plaintiff's participation in the administrative process would be futile," petitioners submit that the two standards (as well as the trial court's "hollow formality" standard) are virtually identical. (*See* App. 23a-24a).

exceptionally high standard, and thus that NEC was entitled to no relief (App. 30a-31a).[7]

The CAFC justified its adoption of the "irrevocably closed mind" standard by invoking the need to maintain flexibility in an administrative process that involves both investigatory and adjudicatory phases, incorporates procedural safeguards, and is subject to judicial review. (App. 21a-28a). The CAFC's discussion of the proper prejudgment standard, however, contained a significant omission. It failed to acknowledge the critical fact that the public pronouncements of NEC's dumping violation, which NEC alleged constituted improper prejudgment, were not made in the course of discharging DOC's duty under the antidumping statute, but as part of an extraneous effort to influence a federal procurement so as "to protect a domestic industry." (App. 31a).

REASONS FOR GRANTING THE WRIT

I. The Federal Circuit's "Irrevocably Closed Mind" Standard Is In Direct Conflict with the Due Process Standard Adopted by Four Other Circuits

A. The District of Columbia, Sixth, Eighth, and Tenth Circuits Each Requires That Adjudicative Hearings Be Completely Fair – in Both Fact and Appearance – When Viewed Through the Eyes of a Disinterested Observer.

In a long line of cases, four United States courts of appeal have applied a single due process standard to allegations that an administrative decisionmaker had prejudged adjudicative

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[7] The CAFC opinion is silent on the propriety of the CIT's adoption of a "clear and convincing proof" standard, notwithstanding this Court's recent decision in *Crawford-El v. Britton*, 118 S. Ct. 1584 (1998), which was brought to the CAFC's attention pursuant to FED. R. APP. P. 28(j).

facts. The D.C. Circuit was the first court to articulate this standard with clarity. In *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965), the Chairman of the Federal Trade Commission had delivered a public address, accompanied by a press release, in which he opined that a specific corporation had engaged in illegal anti-competitive behavior. The address and release coincided with the Chairman's participation in adjudicatory proceedings whose purpose was to determine whether the corporation was in fact complicitous in such behavior. The D.C. Circuit formulated the test for assessing the existence of prejudgment in terms of whether "'a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it,'" *Id.* at 760 (quoting *Gilligan, Will, & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959)), and whether, as a result, the administrative proceedings were "'attended, not only with every element of fairness but with the very appearance of complete fairness,'" *Id.* (quoting *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962)). Reaching an affirmative answer to the first query and a negative answer to the second, the court held that the Chairman's participation in the adjudicative proceeding constituted an unconstitutional denial of due process.

The D.C. Circuit relied on the same prejudgment test in *Cinderella Career & Finishing Sch. Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970). The issue before the court was whether an FTC Chairman who had publicly questioned the ethical propriety of an advertisement promising applicants that they could "become[ ] airline[ ] hostess[es] by attending a charm school" should have been disqualified from a subsequent adjudicatory proceeding to determine whether a corporation that had made precisely this promise was guilty of false

advertising. *Id.* at 590. Although the Chairman had neither named the corporation itself in his speech, nor suggested that such advertisement was necessarily illegal (only potentially unethical), the court of appeals nonetheless found that the Chairman's statements regarding disputed issues of fact in a pending proceeding required his disqualification. The court reasoned that:

> Conduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record.

Id. at 590. Concluding that a disinterested observer might believe the Chairman had prejudged the facts before him, the court held that his participation in the adjudicatory process would entail a denial of due process. *Id.* at 591.

The Sixth Circuit, in another case involving the FTC, was confronted with prejudgment allegations against an FTC Commissioner who, during his tenure as counsel to a Senate subcommittee investigating the drug industry, had made statements indicating his belief that a particular company had violated the antitrust laws, and had helped draft a report critical of the company. Applying the disinterested observer standard articulated in *Texaco*, the court held that the Commissioner must be disqualified from participating in subsequent FTC hearings involving the same company and issues. *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966). The court reasoned with respect to the Commissioner's statements in his former capacity that:

> Any opinions so formed were conclusions as to facts, and not merely an 'underlying philosophy' or a 'crystallized point of view on questions of law or

> policy.' The[se] facts . . . are inseparably a part of the ultimate findings of fact of the Commission . . . in the present proceeding.

Id. at 765.

The Tenth Circuit adopted the D.C. Circuit's prejudgment standard in *Staton v. Mayes*, 552 F.2d 908, *cert. denied*, 434 U.S. 907 (1977). *Staton* involved a due process challenge to the participation of three school board members in the board's decision to dismiss a district superintendent for incompetence. One of the challenged members had previously campaigned for office on a promise to remove the superintendent, and the other two board members had publicly discussed the need for a new superintendent. Citing *Cinderella* and *Texaco*, the Tenth Circuit rejected the claims of these members that they had maintained their impartiality at the formal hearing, and held that the superintendent had been denied due process because "the circumstances left no room for a determination that there was a decision by a fair tribunal, with the appearance of fairness." *Id.* at 914-15.

In *Antoniu v. SEC*, 877 F.2d 721 (8th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990), the Eighth Circuit became the latest federal court of appeals to embrace the prejudgment test originally formulated by the D.C. Circuit in *Texaco*. *Antoniu* concerned alleged prejudgment by an SEC Commissioner who stated in a speech that a named individual had been permanently banned from the securities industry, notwithstanding the fact that a proceeding on that very issue was then pending before the agency. The Eighth Circuit, citing *Texaco*, *Cinderella*, and *Staton*, held that the Commissioner's conduct created a credible impression that he had "'in some measure adjudged the facts as well as the law of a particular case in advance of hearing it'" and that his participation in the SEC's administrative proceeding therefore

constituted an unconstitutional deprivation of due process. *Id.* at 725 (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959)). In so doing, the court affirmed that, consistent with the overarching due process requirements of "a fair trial in a fair tribunal," an adjudicative proceeding must be conducted by a truly neutral decisionmaker. *Id.* at 724 (citation omitted).

B. The Federal Circuit's Decision in *NEC v. United States* Conflicts with the Foregoing Decisions, Notwithstanding Substantially Indistinguishable Facts.

The test for assessing the existence of prejudgment in an antidumping proceeding conducted by the Department of Commerce has not previously been explicitly articulated by a federal court. (*See* App. 20a-21a). Yet the absence of applicable precedent in the antidumping context does not render the question presented a novel one. The defining elements of NEC's claim are identical to those addressed by the Sixth, Eighth, Tenth and District of Columbia circuits: (1) an adjudicative proceeding; (2) a Constitutional right to procedural due process; and (3) an act of apparent prejudgment by a decisionmaker acting outside the scope of his statutorily mandated duties.

First, antidumping proceedings, like the proceedings at issue in *Texaco*, *Cinderella*, *Staton*, and *Antoniu*, are adjudicative: that is, they make "binding determinations which affect the legal rights of individuals." *Hannah v. Larche*, 363 U.S. 420, 442 (1960); *see also Morgan v. United States*, 304 U.S. 1, 20 (1938) (holding that an inquiry conducted by the Secretary of Agriculture was adjudicative because it featured

"the elements of contested litigation").[8] Although the trial court justified its rejection of the "disinterested observer" standard in part because it viewed antidumping proceedings as "investigatory" rather than "adjudicatory," (App. 66a), its own analysis belied that characterization,[9] and the Federal Circuit tacitly rejected the trial court's position.[10]

The purportedly "distinct" nature of antidumping adjudications cannot explain the Federal Circuit's rejection *sub silentio* of the due process standard adopted by all prior

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[8] This case should not be confused with a successor that involved a challenge to a *rulemaking* decision taken by the Secretary. *See United States v. Morgan ("Morgan II")*, 313 U.S. 409 (1941). That later *Morgan II* case is discussed *infra*.

[9] The trial court observed that, by statutory prescription, antidumping actions must include

> a final determination in which the Department must articulate and substantiate its decisionmaking; an opportunity to submit factual information and legal argument; an opportunity to argue important issues at a hearing; and an opportunity for judicial review of the final determination.

(App. 66a-67a) (internal citations omitted). It would be difficult to imagine "elements of contested litigation," *Morgan*, 304 U.S. at 20, that more clearly mark proceedings as adjudicative.

[10] The Federal Circuit's opinion makes no reference whatsoever to the trial court's categorization of antidumping proceedings as investigative, nor does it explicitly address how such proceedings should properly be categorized. Instead, it describes antidumping actions as consisting of both investigative and adjudicative components. (App. 20a) (suggesting that administrative tasks such as anti-dumping proceedings involve a "blend of investigative and adjudicative functions"); (App. 21a) (noting that the Department of Commerce is "charged with the duty both to investigate and then judge"). Petitioners will refer to proceedings with both investigative and adjudicative components as "adjudicative" to distinguish them from *rulemaking* proceedings, which involve a much more stringent test of prejudgment. *See infra*.

circuits that have confronted the question of whether a decisionmaker should be disqualified for having prejudged the outcome of an administrative adjudication. Like the *Texaco* line of prejudgment cases which center on two-stage proceedings with investigative and adjudicative components,[11] antidumping proceedings also involve both investigatory and adjudicatory functions. As with the administrative proceedings at issue in those cases, antidumping proceedings are subject to the due process requirements that generally attach to adjudicative proceedings. *Hannah*, 363 U.S. at 442 ("when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with judicial process").

Second, NEC has maintained from the outset that its interest in the fair and neutral administration of the antidumping laws derives from its Constitutional right to due process. The Federal Circuit accurately construed NEC's claim to be "of the kind generally cognizable under the Fifth Amendment." (App. 18a). Although the court declined to hold that NEC's due process claim was Constitutionally grounded, (App. 19a-20a), in determining "what process is due" the Federal Circuit relied exclusively on Constitutional precedents, and stated that *even if* the right is statutory, the

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[11] *See Texaco*, 336 F.2d at 756 (noting that the Federal Trade Commission conducted a four year "investigation" prior to initiating the action contested in the suit); *see also Antoniu*, 877 F.2d at 722-723 (detailing the SEC's investigative role prior to its adjudication of the appropriate punishment for the offender who ultimately sued); *Cinderella*, 425 F.2d at 590 (noting that the FTC has the "power to act in an accusatory capacity" and to gather facts for that purpose, as well the "responsibility of ultimately determining the merits of the charges so presented") (internal quotations omitted).

"applicable procedural standard [is] not unlike that of constitutional due process." (App. 19a).

Finally, not only do the case at bar and the *Texaco* line of cases address the same basic type of adjudicative proceeding, but the facts surrounding Commerce's alleged prejudgment are squarely analogous to the prejudicial conduct of comparable administrative decisionmakers in those cases. These are not cases in which a party was challenging the mere combination of investigatory and adjudicatory functions within a single administrative body. Rather, the relevant challenge in the *NEC* case and the *Texaco* line of cases concerned the fact that the administrative decisionmakers announced the substance of their "guilty verdict" outside the course of ordinary procedures specified by either statute or regulation, and prior to reaching a formal decision in adjudicative proceedings involving the same factual questions. Moreover, none of these cases involved a challenge to a decisionmaker who merely took a position on a legal issue or a matter of policy; each decisionmaker was found to have prejudged disputed adjudicative facts, *i.e.*, particular facts regarding particular parties.

Despite these virtually indistinguishable facts, the Federal Circuit refused, without explanation, to address the *Texaco* line of cases, and instead adopted the "irrevocably closed mind" standard for disqualification. By so doing, it was able to sanction the conduct of the Supercomputer Investigation by Commerce officials whose prior pronouncements regarding the level of dumping inherent in NEC's UCAR bid would unquestionably have led a disinterested observer to conclude that they had, at least in some measure, already adjudged the facts put at issue by Cray's dumping allegations.

C. The Federal Circuit Erroneously Adopted a Disqualification Standard That Was Crafted by this Court to Address Prejudgment of Legislative, Not Adjudicative, Facts

The adjudicative nature of antidumping proceedings notwithstanding, the Federal Circuit has adopted a test of prejudgment that has previously been applied solely in the very different context of legislative facts. Specifically, it requires petitioners to

> establish that the decision maker is not capable of judging a particular controversy fairly on the basis of its own circumstances. This standard is met when the challenger demonstrates . . . that the decision maker's mind is irrevocably closed on a disputed issue.

(App. 24a) (internal quotations omitted). The Federal Circuit inexplicably drew its standard from the rulemaking paradigm, despite having correctly recognized the adjudicative nature of both the Supercomputer Investigation and the facts alleged to have been prejudged.

The Federal Circuit derived the "irrevocably closed mind" standard from *FTC v. Cement Inst.*, 333 U.S. 683 (1948), which it cites for the proposition that an administrative decisionmaker's prior public statement of "views contrary to the plaintiff's position" is not a violation of due process. (App. 22a). This reading of *Cement Institute*, however, is overbroad. *Cement Institute* stands only for the proposition that prior announcements of views *on questions of law and policy*, as distinguished from views on disputed adjudicative facts, do not disqualify an agency from later adjudicating such factual issues. In that case, this Court held that the FTC did not violate due process when it testified and reported to Congress and the President on policy issues involving a

pricing mechanism, and later issued a cease-and-desist order against a particular party's use of the same pricing system. The Court applied the "irrevocably closed mind" standard based on its reasoning that the Commissioners' testimony regarding general issues of policy involving the pricing mechanisms — and not the specific facts of the respondents' pricing practices — did not suggest that the Commissioners had impermissibly prejudged the adjudicative facts in the case before them. *Id.* at 701-702.

Like *Cement Institute*, the other decisions of this Court on which the Federal Circuit relied to support its formulation of the disqualification standard pertain to challenges based on alleged prejudgment of legislative, rather than adjudicative, facts. *See Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 495 (1976) (school board alleged to have prejudged a decision that "was not an adjudicative decision," but one that turned ultimately on the answer to a policy question);[12] *United States v. Morgan ("Morgan II")*, 313 U.S. 409, 417 (1941) (Secretary of Agriculture alleged to have prejudged facts that fell into "the legislative realm of fixing rates").

The Federal Circuit's reliance on the *Cement Institute* standard ignored well-settled distinctions between the test that must be met to disqualify an administrative decisionmaker who is alleged to have prejudged broad issues of law, policy, or legislative fact, as opposed to the test applicable to alleged prejudgment of specific factual questions pertaining to particular persons or entities. The D.C. Circuit explained this distinction in *Association of Nat'l Advertisers v. FTC*, 627

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[12] In *Staton*, the Tenth Circuit distinguished *Hortonville* on this ground, noting that, in contrast to *Hortonville*, *Staton* involved adjudicative facts concerning alleged incompetence and neglect of duty. 552 F.2d at 913-14.

F.2d 1151 (D.C. Cir. 1979). There it held that the due process standard established for adjudicatory proceedings in *Cinderella* was not applicable to the disqualification of a decisionmaker in a rulemaking proceeding, because of

> the 'recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules [i.e., rulemaking proceedings]. . . on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.'

Id. at 1165 (quoting *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973)). The court emphasized that "[i]n determining the due process applicable . . . [it was] guided by [the proceeding's] nature as rulemaking," and not by other specific facts regarding the rulemaking itself. *Id.* at 1165.

The leading authorities on administrative procedure have also recognized that the "irrevocably closed mind" standard is applied in rulemakings or other administrative proceedings where only questions of policy are alleged to have been prejudged, and have emphasized that,

> if the decisionmaker expressed strong prior views on a disputed issue, the reviewing court must analyze the statements and issues carefully to determine whether the statements evidence impermissible prejudgment of an issue of adjudicative fact or permissible expression of strong views on issues of law, policy, or legislative fact.

KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, § 9.8, at 82-84, 87 (3d ed. 1994) (noting that the "irrevocably closed mind" standard represents the proposition that "[a] previously announced

position on a disputed issue of law, policy or legislative fact does not disqualify a decisionmaker") (citing *FTC v. Cement Institute*, 333 U.S. 683 (1948)). The Federal Circuit exhibited no appreciation of this critical distinction, despite the fact that NEC had discussed it in its briefs.

II. In Applying the "Irrevocably Closed Mind" Standard to NEC's Prejudgment Claim, the Federal Circuit Decided an Important Question of Constitutional Law Which Has Not Been Settled by this Court

A. The Decisions of This Court on Which the Federal Circuit Relied Do Not Resolve the Issue Presented by NEC's Prejudgment Claim

The Federal Circuit erroneously construed certain prior decisions of this Court as having rejected the application of the "disinterested observer" test to the type of prejudgment claim brought by NEC. (*See* App. 21a-24a). The Supreme Court has not in fact settled this important question of law.

The Supreme Court precedents on which the CAFC relied establish only the limited proposition that a decisionmaker may permissibly announce a preliminary conclusion regarding adjudicative facts — in the context of an investigative or other proceeding conducted pursuant to procedures established by statute or regulation — and then revisit those same factual issues in the context of a subsequent adjudication. The Federal Circuit relied heavily on *Withrow v. Larkin*, 421 U.S. 35 (1975), a case in which a physician challenged a statute that empowered members of a medical board to make findings of fact and conclusions of law in the course of investigating whether a physician had engaged in conduct proscribed by statute, and then to revisit those same questions at a formal adversary hearing convened to resolve the issue. *Id.* at 41. This Court declined to find a due process violation solely by virtue of the combination of investigative and adjudicative

functions, both of which had been entrusted by law to the same adjudicative body. There were no allegations of prejudgment based on conduct that fell outside the decisionmaker's legal duties. *Id.* at 54 ("there was no more evidence of bias or the risk of bias or prejudgment than inhered in the very fact that the Board had investigated and would now adjudicate").

The *Withrow* Court was careful to note that its holding did not reach the type of circumstances posed by cases such as *Texaco*, *Cinderella*, and *American Cyanamid*. *Id.* at 50. Citing those cases by name, this Court specifically observed that they presented "factors not present in the record before us," — namely, anomalies in the decisionmakers' conduct providing grounds to "suspect[ ] that [they] . . . would be disabled from hearing and deciding on the basis of the evidence to be presented." *Id.* at 50 n.16, 54. Yet it is precisely such anomalous factors that exist in the case at bar.

NEC does not contend that Commerce's exposure to the facts surrounding NEC's UCAR bid in the course of DOC's internal deliberations regarding the possible self-initiation of an antidumping proceeding would have warranted disqualification. Nor would NEC's right to due process have been violated solely by virtue of a DOC decision to self-initiate such a proceeding. Rather, NEC has alleged prejudgment only because of highly irregular actions and pronouncements by Commerce that took place entirely *outside* the established statutory and regulatory procedures governing antidumping proceedings — aptly characterized by the Federal Circuit as "a high-level political buzz saw." (App. 31a) There was no suggestion of any such irregularity in *Withrow*.

The other decisions of this Court cited by the Federal Circuit are equally devoid of the anomalous "factors" that the *Withrow* Court noted in *Texaco*, *Cinderella*, and *American*

Cyanamid. Like *Withrow*, they all involved a claim of bias inherent in the ordinary structure of an administrative proceeding with successive stages. *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Assoc.*, 426 U.S. 482, 494-495 (1976) (a school board which had been unsuccessful in negotiating a contract with a teachers' union, and later terminated the employment of those teachers who went on strike, had not denied teachers their right to an impartial decisionmaker solely by virtue of the board's familiarity with the facts as a result of the board's performance of its statutorily mandated activities); *FTC v. Cement Inst.*, 333 U.S. at 701 (FTC studies which would later serve as the target for allegations of prejudgment by the Commission were "fil[ed] . . . in obedience to congressional command"); *Richardson v. Perales*, 402 U.S. 389 (1971) (a social security hearing examiner may, pursuant to prescribed procedures, gather evidence and resolve disputes while maintaining impartiality); *United States v. Morgan ("Morgan II")*, 313 U.S. 409, 421 (1941) (Secretary of Agriculture could re-adjudicate a rate-making proceeding on remand, despite his public protest concerning the reversal of his initial decision).[13]

By construing these decisions as encompassing the type of claim presented by NEC, the Federal Circuit erroneously attributed to this Court a position which it has never adopted.

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[13] As discussed *supra*, *Hortonville*, *Cement Institute*, and *Morgan II* are also distinguished from *NEC* by the fact that the alleged prejudgment pertained to issues of law and policy, rather than adjudicative facts.

B. The Supreme Court Should Take This Opportunity to Address the Degree to Which an Administrative Agency Charged with a Combination of Investigative and Adjudicative Functions May Take a Position on Disputed Factual Issues Outside the Established Statutory Framework

NEC joins *Texaco*, *Cinderella*, *American Cyanamid*, *Antoniu*, and *Staton* in the line of United States court of appeals decisions that have, without the benefit of this Court's direct guidance, considered the due process standard for disqualifying an administrative decisionmaker alleged to have engaged in prejudgment where (1) the prejudgment pertains to adjudicative facts in dispute in an administrative proceeding, and (2) the decisionmaker's prior pronouncements regarding such facts took place outside statutorily prescribed forums and procedures. Granting NEC's petition for a writ will afford this Court an opportunity to address this important question of Constitutional law which it has not heretofore directly addressed.

The Supreme Court recognized in *Withrow* that it had not specifically considered the issue that is presented by this petition, *i.e.*,

> [whether an administrative decisionmaker's] initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision . . . [or whether] other special facts and circumstances [counsel that] the risk of unfairness is intolerably high.

421 U.S. at 58. Commentators have recognized that the standard for disqualification in such circumstances is not

always clear. KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, § 9.8, at 68 (1994) (remarking that with respect to the legal principles governing different types of bias that may arise in an administrative proceeding, "[T]he problems about the law . . . relate to their application and to the clear demarcation of each from the others").

Both the parties who appear before administrative decisionmakers in proceedings where adjudicative facts are in dispute, as well as those decisionmakers themselves, are entitled to a clear statement by this Court regarding the due process standard that governs the actions of "those 'whose impartiality serves as the ultimate guaranty of a fair and meaningful proceeding in our constitutional regime.'" *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 619 (1993) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980)). The importance of this issue as matter of United States Constitutional law independently justifies review by this Court.

III. The Federal Circuit's Decision Should Be Reviewed By This Court Because It Effectively Creates a Due Process "Double Standard" Which Could Be Viewed As Discriminatory by our Trading Partners.

The Supreme Court should review the split created by the Federal Circuit's departure from decisions in the Sixth, Eighth, Tenth, and District of Columbia circuits, not only because it has created a conflict on an important issue of Constitutional law, but also because it has effectively resulted in two due process standards for disqualification of an administrative adjudicator on grounds of prejudgment — a virtually insurmountable standard that will apply to the complaints of non-citizens who are drawn into international trade proceedings overseen exclusively by the Federal

Circuit[14], and another, more reasonable standard that applies to prejudgment challenges brought in every other circuit that has addressed the issue.

Parties aggrieved by prejudgment in an administrative adjudication who bring their claims before the other courts of appeal that have spoken on this issue have recourse to the protection of *Texaco*, *Cinderella*, and their progeny. To obtain a judicial remedy, they need only show that a disinterested observer might conclude that the decisionmaker prejudged the facts and law of the case in advance of the hearing, and, in turn, that the hearing was not attended by the appearance of fairness. *See*, *e.g.*, *Texaco*, 336 F.2d at 760. But foreign companies aggrieved by prejudgment in an antidumping, countervailing duty or unfair trade proceeding — surely among the most significant ways in which foreign companies interact with the American legal system — face a much more daunting task. To win judicial relief after the Federal Circuit's *NEC* decision, they must show that the decisionmaker was not capable of judging the controversy fairly because his mind was "irrevocably closed." (App. 24a).

If the circuit split is not resolved by this Court, foreign parties will disproportionately be required to satisfy a higher standard to disqualify an administrative decisionmaker on grounds of prejudgment. The fact that an American petitioner in an antidumping case might also theoretically suffer from the CAFC's more stringent prejudgment standard is true as a matter of logic, but naive in the context of the actual administration of the antidumping laws. As the CAFC

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[14] *See* 28 U.S.C. § 1295(a)(5) (Federal Circuit has exclusive jurisdiction over appeals from final decisions of the Court of International Trade), and § 1295(a)(6) (exclusive jurisdiction over final determination of the U.S. International Trade Commission relating to unfair practices in import trade).

forthrightly observed, "[t]he entire system that Congress has established under the Tariff Acts is designed to protect domestic industries from 'unfair foreign competition.'" (App. 31a). Nor does the fact that foreigners encounter our legal system in areas outside the CAFC's jurisdiction mitigate the disparate impact that the circuit split will have on non-citizens. The perception of unequal treatment in the one circuit expressly established by Congress to adjudicate trade disputes between U.S. and foreign companies will not be dispelled by the fact of equal treatment in other fora.

The Federal Circuit's decision will not go unnoticed by the United States' international trading partners, who will perceive a baseless double standard in our Constitutional due process jurisprudence. This undesirable perception will only be exacerbated by the CAFC's failure to correct explicitly the CIT's patently erroneous holding that "[t]he constitutionally driven concerns of formal adjudicatory proceedings are not at issue in antidumping cases." (App. 66a n.95). Review by this Court to reconcile the circuit split would go far to ensure that our system of administrative law and judicial review does not lose credibility in the eyes of the world community.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 5, 1998

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

98-1020

NEC CORPORATION and
HNSX SUPERCOMPUTERS, INC.,

Plaintiffs-Appellants,

v.

UNITED STATES and DEPARTMENT OF COMMERCE,

Defendants-Appellees,

and

CRAY RESEARCH, INC.,

Defendant-Appellee.

Robert E. Montgomery, Jr., Paul, Weiss, Rifkind, Wharton & Garrison, of Washington, DC, argued for plaintiffs-appellants. With him on the brief were *Terence J. Fortune*, *Robert P. Parker*, *David J. Weiler*, and *Swati Agrawal*.

Lucius B. Lau, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendants-appellees, United States and Department of Commerce. With him on the brief were *Frank W. Hunger*, Assistant Attorney General, *David M. Cohen*, Director, and *A. David Lafer*, Senior Trial Counsel. Of counsel were *Berniece A. Browne*, *Patrick V. Gallagher*,

David W. Richardson, and *Stephen J. Powell*, Attorneys, U.S. Department of Commerce, of Washington, DC.

Michael L. Burack, Wilmer, Cutler & Pickering, of Washington, DC, argued for defendant-appellee, Cray Research, Inc. With him on the brief were *John D. Greenwald*, *Stuart M. Weiser*, and *Amber L. Cottle*.

Appealed from: United States Court of International Trade

Judge Donald C. Pogue.

DECIDED: August 7, 1998

JUDGES: Before NEWMAN, *Circuit Judge*, SKELTON, *Senior Circuit Judge*, and PLAGER, *Circuit Judge*.

PLAGER, *Circuit Judge*.

This challenge to the Department of Commerce's ("Commerce's") administration of the antidumping laws arises in a somewhat unusual way: plaintiffs-appellants NEC Corporation and HNSX Supercomputers, Inc. (collectively "NEC") seek to enjoin Commerce from conducting an antidumping investigation involving certain supercomputers from Japan. NEC alleges that the deciding officials in Commerce had prejudged the outcome, and therefore were Constitutionally disqualified from proceeding with the investigation. The Court of International Trade denied NEC's petition for an injunction and declaration of rights, and Commerce proceeded to complete its investigation, following which, as NEC feared, Commerce determined that the proposed sales of the Japanese supercomputers were being made at less-than-fair value. NEC appeals the decision of the

Court of International Trade denying the petition for injunction and declaratory judgment.[1]

BACKGROUND

1.

In order to appreciate the gravamen of NEC's complaint, it is necessary to examine in some detail the history of the challenged procurement, and the involvement of various political officials and actors. Though the parties dispute exactly what happened, and the meaning to be attributed to some of the events, the following facts seem to have been established.

The story begins with the decision by the University Corporation for Atmospheric Research ("UCAR") to procure advanced supercomputers for its National Center for Atmospheric Research ("NCAR"). In March 1995, UCAR solicited bids for advanced supercomputers from three supercomputer manufacturers—Federal Computing Corporation ("FCC"); Cray Research, Inc. ("Cray"); and Fujitsu Limited. FCC offered to provide NEC supercomputers, while the other two manufacturers offered to supply their own.

UCAR is a research consortium funded in part by the National Science Foundation ("NSF"), an agency of the United States Government. Under the terms of its Cooperative Agreement with NSF, UCAR was required to obtain NSF approval for the supercomputer acquisition. As part of this approval process, NSF requested that UCAR obtain evidence

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[1] Subsequent to Commerce's determination, the International Trade Commission determined that an industry in the United States is threatened with material injury by reason of these imports. That determination has been challenged by NEC, *see* CIT No. 97-11-01967.

that NEC's[2] offer did not involve dumping, as that term is understood under United States antidumping laws.[3] In response to that directive, UCAR commissioned a study by Dr. Lloyd Thorndyke to analyze NEC's offer. Dr. Thorndyke ultimately concluded that there was no dumping, although he did not consider the effect of research and development costs in his analysis.

Meanwhile, the Department of Commerce decided to look into the matter. Even though NSF did not request that Commerce undertake an antidumping analysis of the UCAR procurement, Commerce undertook a preliminary analysis of NEC's bid. As part of that process, Susan Esserman, Assistant Secretary of Commerce for Import Administration, assembled a team of Import Administration ("IA") officials on April 3, 1996 to collect and analyze NEC's bid data. Three weeks later, on April 24, 1996, Ms. Esserman convened an interagency meeting to obtain technical information on supercomputers and hear a presentation by NSF on the UCAR procurement.

On May 13, 1996, Ms. Esserman, by now Commerce's Acting General Counsel, convened another interagency meeting with senior officials of NSF and other agencies to discuss the results of Commerce's preliminary analysis. The fact of this meeting and what transpired there is one of the sources of contention among the parties.

A few days later, on May 17, 1996, Stuart Eizenstat, Under Secretary for International Trade, and Ms. Esserman met with officials of the National Economic Council to

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[2] Even though FCC was the actual bidder, we will refer to FCC as NEC because NEC was and is the real party in interest throughout.

[3] *See generally* 19 U.S.C. § 1673 (1994) et seq.

discuss the matter. At that meeting, Mr. Eizenstat and Ms. Esserman provided a short, factual briefing on the UCAR procurement and the IA inquiry.

At about the same time, Brian Mannion, Grants and Agreements Officer at NSF, decided to reiterate to UCAR NSF's concern about the possibility of dumping, based on the meetings with Commerce. In a letter dated May 17, 1996, Mr. Mannion informed UCAR of the results of those meetings:

> UCAR has provided NSF with several documents that addressed the "antidumping" issue. Subsequently, officials at the Department of Commerce, which has statutory responsibility for administering relevant provisions of the antidumping laws, have advised NSF that they have performed a "constructive analysis" of the proposal with the best performance characteristics. They have reached the preliminary conclusion that the proposal does not constitute an offer at "fair value."

NSF accordingly encouraged UCAR to give the antidumping issue "due consideration" before concluding final negotiations.

Undeterred by NSF's letter, on May 20, 1996, UCAR announced that it had selected NEC's bid to supply a system of four FCC 32 processor SX-4 vector supercomputers. (Each computer would cost about $ 13.25 million for the first year of the procurement.). According to UCAR, the NEC systems "provide a distinct technical advantage compared to the systems offered by the other vendors."

On the same day, Commerce transmitted to NSF a letter from Acting Assistant Secretary Paul Joffe to Dr. Neal Lane, Director of NSF (this became known as "the Joffe letter"). In that letter, Mr. Joffe stated:

> Using standard methodology prescribed by the antidumping law, we estimate that the cost of production of one of the foreign bidders is substantially greater than the funding levels projected by NCAR's request for proposals. In antidumping law terms, this means that the "dumping margin," that is, the amount by which the fair value of the merchandise to be supplied exceeds the export price, is likely to be very high.

The letter also stated that Commerce had "significant concern that importation of the NCAR supercomputer system would threaten the U.S. supercomputer industry with material injury within the meaning of the antidumping law." Thus, Commerce apparently concluded based on its analysis that all the conditions for assessing an antidumping duty were present.

This was confirmed in another letter sent by Mr. Joffe to Dr. Lane, which included a "Predecisional Memorandum" outlining Commerce's methodology. The Predecisional Memorandum estimated NEC's dumping margin to be in the range of 163.38% to 280%. Commerce's analysis was not based on actual NEC pricing data. Instead, it was based on information gleaned from various governmental sources, including the Thorndyke study and NEC financial statements. At NSF's suggestion, Commerce gave NSF authorization to forward a copy of the Predecisional Memorandum to NEC, UCAR and NCAR.

Commerce then made a copy of the Joffe letter available to the press and public, including NEC's competitor Cray. The letter was reproduced in *Inside U.S. Trade*, an industry periodical, on May 24, 1996. The Predecisional Memorandum, which had been given only limited distribution within the Government, was published in *Inside U.S Trade* several months later. No one admitted to having leaked it.

On June 5, 1996, Robert LaRussa succeeded Mr. Joffe as Acting Assistant Secretary of Commerce for Import Administration. Prior to that time, Mr. LaRussa had no involvement with the UCAR procurement. Two days later, Gary Taverman, an Office Director of Enforcement Group I within the IA, briefed Mr. LaRussa on IA's involvement in the UCAR procurement. At that time, Mr. LaRussa also read the Joffe letter, but seemingly he did not read the Predecisional Memorandum itself. From then until submission of this case, Mr. LaRussa had no communication with either Mr. Eizenstat or Ms. Esserman relating to the preparation, dissemination, purpose or content of the Predecisional Memorandum or regarding Cray's petition, discussed *infra*. What advice Mr. Eizenstat did give Mr. LaRussa related to general procedures in pending investigations.

At this point congressional involvement became part of the mix. On June 5, 1996, three officials of Commerce — Mr. Joffe, now a Senior Advisor to the Assistant Secretary for IA, Stephen J. Powell, Chief Counsel for IA, and Mr. Taverman — met with staff members from the House of Representatives Ways and Means Committee to discuss the UCAR procurement. At that meeting, Mr. Taverman explained Commerce's antidumping analysis. He prefaced his remarks by indicating that the results were just an "estimate" taken from public information and other governmental sources. Mr. Taverman stressed that Commerce had not made a dumping determination. The three had a similar meeting with the House Science Committee the next day.

On June 11, 1996, Ms. Esserman, Mr. Powell, Mr. Joffe, Mr. Taverman, and Mr. LaRussa met with Representative David E. Skaggs, at his request, to discuss the UCAR procurement. Representative Skaggs represents the congressional district in which UCAR and NCAR are located.

At that meeting, Mr. Taverman again explained Commerce's analysis, but this time in very general terms.

Not long after, on June 20, 1996, Mr. William F. Rawson, Vice President for Finance and Administration of UCAR, responded to Mr. Mannion's letter of May 17. In his letter, Mr. Rawson indicated that UCAR had asked NEC to comment upon Commerce's May 20, 1996, Predecisional Memorandum. UCAR had also, according to Mr. Rawson, previously retained its own experts to independently verify Commerce's analysis. Based on UCAR's own analysis, it concluded that NEC's offer was not at less-than-fair value and that an award to NEC would fully comply with its Cooperative Agreement with NSF.

The move in NEC's favor was short lived. Faced with the conflicting reports from UCAR and Commerce, Dr. Lane wrote Secretary of Commerce Michael Kantor requesting his comments on UCAR's report. Dr. Lane asked Secretary Kantor to inform NSF whether or not Commerce intended to self-initiate an official investigation.

On July 29, 1996, Cray filed an antidumping petition with Commerce and the International Trade Commission ("Commission" or "ITC") against vector supercomputers from Japan. Cray executives and its attorneys had previously met with IA staff for pre-petition counseling. Commerce responded on August 19, 1996, by initiating the supercomputer investigation. *See Vector Supercomputers from Japan*, 61 Fed. Reg. 43,527 (Dep't Commerce 1996) (initial antidumping investigation). The investigation was assigned to IA's Office of Antidumping and Countervailing Duty Enforcement Group II.

In light of Commerce's initiation of an antidumping duty investigation, NSF decided to hold off approval of a contract

award to NEC. Dr. Lane, in a press release, stated that he felt it would be "inappropriate for NSF to approve this procurement until the dumping issue has been resolved," and "inconsistent with the responsible stewardship of taxpayer monies." His sentiments reflected those expressed by some in Congress. *See* H.R. Rep. No. 104-628, at 124-29; 142 Cong. Rec. H6905-02, H6906-07 (1996).

NEC responded by writing to Mr. Eizenstat informing him that NEC had requested that Commerce's Inspector General ("IG") investigate the circumstances surrounding Commerce's involvement in the UCAR procurement, including the release of confidential NEC data to Cray. NEC also requested that Commerce stay its investigation of NEC pending the outcome of the IG's investigation. To allow the investigation to go forward in light of these accusations, according to NEC, "would constitute an egregious and irreparable denial of due process." Mr. Eizenstat referred the letter to Ms. Esserman with instructions that she "draft a response to this outrageous letter." That response denied NEC's request to stay the investigation.

The Chairman of the ITC on September 12, 1996 notified the Secretary of Commerce that the Commission had made an affirmative determination in the preliminary injury phase of the antidumping investigation. *See Vector Supercomputers from Japan*, 61 Fed. Reg. 50,331 (Int'l Trade Comm'n 1996) (preliminary injury determination). Accordingly, on September 30, 1996, Commerce sent NEC and Fujitsu an antidumping questionnaire.

NEC filed the present suit in the Court of International Trade on October 15, 1996. In its suit, NEC sought to enjoin Commerce's investigation of vector supercomputers from Japan on the grounds that its due process rights were violated. In particular, NEC alleged that "Commerce has revealed itself

as a partisan ally of NEC's competitor [Cray] for the UCAR contract, and has rendered itself constitutionally incapable of adjudicating the merits of Cray's dumping allegation." NEC asserted that, by Commerce's actions, it "has deprived NEC and HNSX of their right to a determination by a fair and neutral decision-maker."

On the same day it filed suit, NEC wrote to Secretary Kantor informing him that NEC intended to "respectfully withhold their response to the Department questionnaire until such time as a qualified independent party, who is impartial and has not prejudged the matter, is appointed as a 'special master' to conduct the investigation." NEC has remained true to its word.

Subsequently, Commerce assigned a dumping duty of 454 percent against NEC on importation of supercomputers from Japan. *See Vector Supercomputers from Japan*, 62 Fed. Reg. 45,623, 45,625 (Dep't Commerce 1997). That assessment has since become final. *See Vector Supercomputers from Japan*, 62 Fed. Reg. 55,392 (Dep't Commerce 1997). NEC thereafter filed a complaint in the Court of International Trade under 28 U.S.C. § 1581(c), challenging the ITC's final determination that vector supercomputers from Japan threaten to cause a material injury to a domestic industry.

2.

Before the trial court, defendants — the United States, the Department of Commerce, and Cray Research, Inc. — moved to dismiss the complaint in this case for lack of jurisdiction and failure to state a claim. Specifically, the defendants argued that jurisdiction was not proper under 28 U.S.C. § 1581(i) because NEC had an adequate remedy under 28 U.S.C.§ 1581(c), and therefore the statutorily-available procedure required that NEC await the conclusion of the

investigation, and bring any court action at that time. The trial court denied defendants' motion.

The trial court on March 21, 1997 held a hearing on NEC's motion for a preliminary injunction; the court denied that motion. The court thereafter considered NEC's petition for permanent injunction at a three day trial, conducted on April 14, 15, and 21, 1997. In its ensuing Judgment and Opinion, dated August 20, 1997, the trial court rejected NEC's claim that Commerce's conduct constituted prejudgment having the effect of denying NEC due process under the Fifth Amendment. The court concluded that NEC had no legally cognizable property or liberty interest that could have been deprived by Commerce's actions.

However, the trial court did recognize a statutory prejudgment claim. To prevail on this claim, the court required NEC to prove that Commerce's prior actions rendered the antidumping investigation a "hollow formality" such that "plaintiff's participation in the administrative process would be futile." The court imposed this heavy burden in light of the presumption of honesty and integrity that governmental decision makers enjoy under the law and the investigatory (versus adjudicatory) nature of the antidumping investigation. NEC's burden in this case was even heavier, according to the trial court, because a new decision maker assumed the helm of the investigation. The court found that NEC failed to satisfy this heavy burden, and entered judgment for the defendants. NEC now appeals.

DISCUSSION

On the merits, the parties disagree about what is the proper legal standard for judging the "prejudgment" behavior of the Commerce Department. NEC claims it is entitled to full protection under Constitutional Due Process, specifically to

the right to an unbiased decision maker in fact and in appearance. The Government supports the trial judge's view that a lower standard is appropriate when Commerce is engaged in an antidumping matter. The lower standard, inferred from the statutes which govern import policy, requires only that the procedures and hearing which lead to the decision be fair, and not a "hollow formality."

NEC further complains that the trial court, though it recited the litany of facts summarized above, narrowed its focus when assessing Commerce's conduct to just two events, Ms. Esserman's presentation at the May 13 interagency meeting, and the May 20 Joffe letter and Predecisional Memorandum. Had the trial court kept the entire history in focus, argues NEC, the conclusion of improper prejudgment would be unavoidable under any standard. The Government responds that the trial court's focus was entirely correct because no other evidence in the case would arguably support NEC's prejudgment claim.

And finally, the parties quarrel over the constraints the trial court placed on the obtaining of testimony from certain high-ranking government officials. NEC complains that it was improperly hindered in efforts to make its case, while the Government defends the trial court's handling of the matter as well within the discretion granted to courts in such matters.

If that is not enough, the Government devotes much of its effort on appeal to the proposition that the trial court was without jurisdiction to hear NEC's petition in the first instance, since a suit against the United States requires consent, and the statutes governing the Court of International Trade, when properly read, do not contain that consent. The Government contends here, as they did in their motion to dismiss at the trial level, that the trial court improperly exercised jurisdiction over this case under 28 U.S.C. §

1581(i). As an adjunct to the jurisdictional argument, defendant Cray argues that this appeal is moot because the investigation which NEC sought to enjoin in this case has now been completed.

A.

We first address the jurisdiction question. Chapter 95 of Title 28 of the United States Code, entitled "Court of International Trade," contains Congress' jurisdictional grant to the court. The first section of the chapter is § 1581, "Civil actions against the United States and agencies and officers thereof," and consists of subsections (a) through (j). Subsections (a) through (h) assign exclusive jurisdiction to the Court of International Trade regarding civil actions against the United States in a variety of matters affecting foreign commerce, including the antidumping laws. Subsection (i) contains what has been called a residual provision that grants to the Court of International Trade exclusive jurisdiction over "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for — (4) administration and enforcement with respect to the matters referred to in . . . subsections (a)-(h) of this section." 28 U.S.C. § 1581(i)(4) (1994).

The subsection contains a caveat: subsection (i) "shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable . . . by the Court of International Trade under section 516A(a) of the Tariff Act of 1930." *Id.* In light of this caveat, this court has interpreted the jurisdiction provided by subsection (i) to be available only when jurisdiction under another subsection of 1581 is either unavailable or, if available, "manifestly inadequate." *See Shakeproof Indus. Prod. Div. v. United States*, 104 F.3d 1309, 1312 (Fed. Cir. 1997); *Miller & Co. v. United States*,

824 F.2d 961, 963 (Fed. Cir. 1987). At the time that NEC filed its complaint, it could not invoke the trial court's § 1581(c) jurisdiction because the antidumping investigation had not yet been completed. Nevertheless, because subsection (c) specifically provides for review of any civil action commenced under section 516A of the Tariff Act of 1930, argues the Government, NEC should have waited until Commerce completed its review, and then raised its due process concerns. The trial court rejected the Government's view, and characterized the suggested approach as a "fools errand."

The trial court is correct. Requiring NEC to appeal from the conclusion of an investigation that, allegedly, was preordained because of impermissible prejudgment is a classic example of a remedy that was "manifestly inadequate." *See Pac Fung Feather Co. v. United States*, 111 F.3d 114, 116 (Fed. Cir. 1997) ("[T]he preordained ruling available to importers under section 1581(h) would be manifestly inadequate."); *Hylsa v. United States*, No. 97-12-02168, 1998 WL 51731, at *3 (Ct. Int'l Trade, Feb. 3, 1998) (when a plaintiff alleges that the outcome is preordained, the case "is the very type of situation which is intended to be addressed under 28 U.S.C. § 1581(i)"); *Luggage & Leather Goods Mfrs. of Am. v. United States*, 588 F. Supp. 1413, 1420-21 (Ct. Int'l Trade 1984); *United States Cane Sugar Refiners' Ass'n v. Block*, 544 F. Supp. 883, 887 (Ct. Int'l Trade 1982), *aff'd on other grounds*, 683 F.2d 399 (CCPA 1982). This is not a case in which NEC is attempting to "sail past carefully constructed limitations simply by invoking other and more general legislation." *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1558 (Fed. Cir. 1988); *see St. Paul Fire & Marine Ins. Co. v. United States*, 959 F.2d 960, 963-64 (Fed. Cir. 1992) (finding jurisdiction proper under 1581(i)). Instead, NEC is attempting to adjudicate an issue that goes to

the very heart of the administrative system—neutrality—using the only adequate avenue available. *See McCarthy v. Madigan*, 503 U.S. 140, 148 (1992) ("[A]n administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it.").

With regard to Cray's argument that the case is moot and the appeal should be dismissed because the proceeding NEC sought to enjoin has been concluded, we think otherwise. Article III limits federal judicial power to cases or controversies. *See* U.S. Const. art. III, § 2. If a case becomes moot it no longer presents a justiciable controversy over which a federal court may exercise jurisdiction. *See Kimberly-Clark Corp. v. Proctor & Gamble Distrib. Co.*, 973 F.2d 911, 913 (Fed. Cir. 1992). "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

However, even if an intervening event satisfies some of the plaintiff's concerns, the case is not moot if other consequences of defendants' actions remain. *See Church of Scientology v. United States*, 506 U.S. 9, 13 (1992); *Gandera Ind., S.A. v. Block*, 727 F.2d 1156, 1158 (D.C. Cir. 1984). In their complaint, NEC sought the following relief:

> Plaintiffs pray . . . that this Court issue a permanent injunction enjoining the defendants . . . from making any determination on the merits in the proceeding styled Vector Supercomputers from Japan, Inv. No. A-588-841, *and from such other acts and practices as would deprive plaintiffs of their due process rights*[.]

(Emphasis added). Thus, even though the investigation sought to be enjoined is now complete and the final dumping order has been issued, the question remains whether there are other consequences remaining from Commerce's actions for which the trial court could fashion a remedy.

The final dumping order requires NEC to post a cash deposit of 454 percent of the sales price at the time the entries are made. *See* 62 Fed. Reg. 55,392. If this deposit rate was arrived at in violation of NEC's due process rights this would qualify as "such other acts" that the trial court could enjoin if the court were to rule in its favor. Because the trial court could still fashion a useful remedy in this case by granting prospective relief from the effects of the antidumping order, the case is not moot. *See Church of Scientology*, 506 U.S. at 13. The cases cited by Cray in its brief all stand for the unremarkable proposition that a case is rendered moot by the conclusion of an administrative proceeding when the *only* remedy sought by the plaintiff is to enjoin the proceeding. That is not the case here. *See Gandera*, 727 F.2d at 1158.

B.

We turn now to the merits. The first question we must answer is: Does NEC have a right to some form or level of due process? The trial court, in light of Congress' plenary power over foreign commerce, rejected NEC's constitutional due process claim. Specifically, the court held that NEC lacked a legally cognizable liberty or property interest in its pending antidumping investigation that could be unconstitutionally deprived. NEC asserts that the trial court misconstrued the nature of NEC's claim. The trial court, according to NEC, mischaracterized NEC's claim as a substantive due process challenge rather than a procedural one.

1.

Indisputably, engaging in foreign commerce is not a fundamental right protected by notions of substantive due process. *See Buttfield v. Stranahan*, 192 U.S. 470, 492-93 (1904); *Arjay Assocs., Inc. v. Bush*, 891 F.2d 894, 896 (Fed. Cir. 1989) ("It is beyond cavil that no one has a constitutional right to conduct foreign commerce in products excluded by Congress."). As a result, courts have repeatedly rebuffed substantive due process challenges by importers to statutes which restrict or even prohibit importation:

> As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from consideration of public policy does not violate the due process clause of the Constitution.

Buttfield, 192 U.S. at 493; *see also The Abby Dodge*, 223 U.S. 166, 176-77 (1912); Arjay Assocs., 891 F.2d at 897 ("Appellants cite not one decision, and we are aware of none in the 200 years of our judicial history, which has upheld any right of persons in appellants' position to overturn a Congressional exclusion of any product from importation.").

Nonetheless, an importer may be entitled to procedural due process regarding the resolution of disputed facts involved in a case of foreign commerce when the importer faces a deprivation of "life, liberty, or property" by the Federal

Government. "The Due Process Clause requires a hearing of some kind . . . when government deprives an individual of 'life, liberty, or property' based on resolution of contested factual issues concerning that individual . . . ." 2 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.2, at 3 (3d ed. 1994); *see also United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973).

The trial court held that NEC's Constitutional due process claim failed because NEC had no legally cognizable right, property or otherwise, to engage in foreign commerce. NEC's claim, however, was not a challenge to the Government's legislative power to regulate NEC's conduct in foreign commerce, as in *The Abby Dodge, Arjay*, and the other cases relied on by the trial court. Instead, NEC claims that the determination of certain contested facts regarding the pending antidumping investigation against it was tainted by prejudgment. This is a procedural due process claim of the kind generally cognizable under the Fifth Amendment of the Constitution.

In recent years the Supreme Court has abandoned the earlier narrow reading of "rights" subject to constitutional protection, and extended constitutional coverage to some statutory entitlements previously thought of as "privileges." *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Goss v. Lopez*, 419 U.S. 565 (1975) (suspension from school); *see also Board of Regents v. Roth*, 408 U.S. 564, 571 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."). Although the Court has not gone so far, commentators have argued that the Framers intended "life, liberty, and property" to be read as a single term that refers to "all interests valued by sensible men." Henry Monaghan, *Of*

"Liberty" and "Property," 62 Cornell L. Rev. 405, 409 (1977). (*See* 2 Davis & Pierce, *supra*, § 9.4, for a discussion of the interests which have been held protected, and those that have not, and the view that the Court's line-drawing jurisprudence in this area is not entirely satisfactory.)

The trial court avoided immersing itself in that debate by concluding that, though no constitutionally-protected right might exist, there inheres in the statutory scheme created by Congress an implicit expectation that governmental decision makers will act honestly and fairly in the performance of their duties. The court noted the presumption, rebuttable, that their actions are so motivated. From this, the trial court discerned an applicable procedural standard not unlike that of constitutional due process.

We share the trial court's commitment to the proposition that there inheres in a statutory scheme such as this an expectation that those charged with its administration will act fairly and honestly. That proposition is not based on blind hope or naivete, but on a shared expectation of how the Government will conduct itself. *See, e.g.*, *Parsons v. United States*, 670 F.2d 164, 166 (Ct. Cl. 1982) ("It is well established that there is a presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations, and the burden is on the plaintiff to prove otherwise."); *Haley v. Department of the Treasury*, 977 F.2d 553, 558 (Fed. Cir. 1992).

In the context of this case, however, we need not decide whether the obligation imposed on the Government to deal honestly and fairly with those who come before it arises from the existence of the law itself and the implicit assumptions about how Congress intends Government decision makers to conduct themselves, *see Parsons*, 670 F.2d at 166, or resides

in a constitutionally-protected liberty or property interest of an importer who accepts the Government's invitation to engage in commerce within the United States pursuant to the laws thereof, *see Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("'While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate safeguards.'") (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part)); *cf. Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1021 (1998) (Stevens, J., concurring) ("Because it is always prudent to avoid passing unnecessarily on an undecided constitutional question, the Court should answer the statutory question first." (citation omitted)). There can be no doubt that arbitrary administration of the law is subject to judicial intervention; it is enough for us to here conclude that NEC is due a fair and honest process; the question that remains, then, is what process is due.

2.

The right to an impartial decision maker is unquestionably an aspect of procedural due process. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *In re Murchison*, 349 U.S. 133, (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). This applies to administrative proceedings as well as judicial trials. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

But the blend of investigative and adjudicative functions sometimes found in modern administrative agencies requires that a pragmatic approach be taken to what qualifies as an "impartial" decision maker. As the Government notes, neither the Court of International Trade nor this court previously has addressed the proper legal standard to be applied in a

prejudgment claim involving Commerce's antidumping duty proceedings. NEC offers the following articulation of the prejudgment standard: "the test to be applied is whether objective facts reveal that the decision maker has 'in ***some measure***' prejudged the issues presented in a subsequent administrative hearing." *Brief for Plaintiffs-Appellants* 28. Under this standard, "a prejudgment claim must be sustained if there is even the ***appearance*** of unfairness." *Id.* at 29.

As an abstract proposition, NEC's proposed standard is a goal to which all government decision makers might aspire. However, as a practical matter, we are not persuaded that NEC's standard is the correct one when imposed on administrative agencies charged with the duty both to investigate and then judge. First of all, this strict standard is inconsistent with prior prejudgment cases. A leading case on the question of agency prejudgment is *Withrow v. Larkin*, upon which both parties rely and to which we now turn.

Wisconsin statutes established a State Examining Board, composed of practicing physicians, to license and discipline physicians. When charges against a physician were filed with the Board, the Board first held an investigative proceeding to consider the charges, and then, if it determined the evidence warranted, held a 'contested hearing' to determine whether the charges should be sustained, and, if so, the appropriate penalty, which could include revocation of license. *See Withrow*, 421 U.S. at 37-38. The district court held that such a proceeding was a denial of an accused doctor's procedural due process rights because the Board did not qualify as an independent decision maker. *See id.* at 46. The Supreme Court reversed.

Drawing the distinction between previous knowledge of the facts and an advance commitment about them, the Court concluded that this combination of investigating and judging

was not a denial of due process under the circumstances. The Court acknowledged that permitting those who investigate to then sit in judgment raises a substantial issue. However, the Court pointed out that that is not a new issue, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. Concluding that "[t]he incredible variety of administrative mechanisms in this country will not yield to any single organizing principle," *id.* at 52, the Court looked instead at the various situations which have been identified "in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable," *id.* at 47.

The Court cited cases in which the adjudicator has a pecuniary interest in the outcome, and those in which the adjudicator has been the target of personal abuse or criticism from the party before him, as examples of unacceptable risk of bias. On the other hand, the Court did not find the risk of prejudgment resulting from having the investigator also as the adjudicator a risk that was, per se, too high. The Court cited to *FTC v. Cement Inst.*, 333 U.S. 683 (1948), in which the Court had held that even though members of the Commission had publicly stated views contrary to the plaintiff's position, "the fact that the Commission had entertained such views as a result of its prior ex parte investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject." *Id.* at 701.

The Court also cited favorably to *Richardson v. Perales*, 402 U.S. 389, 410 (1971), a case rejecting a due process objection to the multiple roles— investigator and adjudicator — of the Examiner under the Social Security System. The Court noted that "the challenge to this combination of

functions 'assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity.'" *Withrow*, 421 U.S. at 49-50.

Nor is a decision maker disqualified simply by making a public statement concerning the case, *see Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976); *FTC v. Cinderella Career & Finishing Sch., Inc.*, 404 F.2d 1308, 1315 (1968), even when that statement is made before Congress, *see Cement Inst.*, 333 U.S. at 702-703. Other administrative cases have also rejected prejudgment claims despite what could be characterized as prejudgment "in some measure" giving rise to the "appearance of unfairness." *See, e.g., Hortonville*, 426 U.S. at 493; *Cement Inst.*, 333 U.S. at 702-703; *United States v. Morgan*, 313 U.S. 409, 421 (1941).

We recognize that many of these cases deal with decision-making by multiple-member boards, whereas our case involves a single administrative decision maker. We do not see that this difference should call for a different assessment of the behavior involved. Thus, it is difficult to resolve these outcomes with the standard that NEC advocates. We would be blinding ourselves to the reality of the administrative process that Congress has created were we to hold that the mere fact that a decision maker has been involved in the development of the case, either through a field investigation or a public hearing, or indeed has taken, preliminarily, a public position on the case, is enough to place the entire process under a constitutional cloud from which it cannot be shielded.

On the other hand, the shield the Government proposes for its agents is one that would require the plaintiff to show "that plaintiff's participation in the administrative process

would be futile." The Government rightly characterizes its standard as "a difficult one to sustain." Fortunately we need not choose between these polar versions of what is to be expected from a Government decision maker; Supreme Court case law suggests a useful standard by which we may judge NEC's claim of prejudgment without necessarily establishing a standard for all time and for all cases.

NEC can prevail on its claim of prejudgment only if it can establish that the decision maker is "not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Hortonville*, 426 U.S. at 493 (quoting *Morgan*, 313 U.S. at 421). This standard is met when the challenger demonstrates, for example, that the decision maker's mind is "irrevocably closed" on a disputed issue. *Cement Inst.*, 333 U.S. at 701. This standard is appropriate in this case for two reasons.

The first is that "administrators 'are assumed to be men of conscious and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Withrow*, 421 U.S. at 55 (quoting *Morgan*, 313 U.S. at 421). Were we routinely to accept challenges to the administrative decision-making process based on claims of prejudgment, we would undermine the presumption that administrators fulfill their obligations with the highest level of integrity and honesty.

The second, more practical reason, is that the administrative process must have the flexibility necessary to accomplish its mission. Although "we should be alert to the possibility of bias that may lurk in the way particular procedures actually work in practice," *Withrow*, 421 U.S. at 54, we are reluctant to circumvent the normal administrative procedure absent a showing that the decision maker's mind is "irrevocably closed."

The antidumping system is a good example of the need for such flexibility. First of all, an antidumping investigation is bifurcated: Commerce makes less-than-fair value determinations for a class or kind of foreign merchandise, and the ITC makes injury determinations. Only if Commerce determines that the merchandise is being sold at less-than-fair value ("LTFV"), *see* 19 U.S.C. § 1673(1) (1994), *and* the ITC determines that a domestic industry is materially injured or is threatened with material injury, *see* 19 U.S.C. § 1673(2), does Commerce issue an antidumping order. *See* 19 U.S.C. § 1673. This bifurcation reduces the risk that an improper bias will deprive importers of their due process rights.

Second, the investigation within Commerce proceeds in two stages — a preliminary determination and a final determination. *See* 19 U.S.C.§§ 1673b(b), 1673d(a) (1994). The purpose of the preliminary determination is to ascertain whether there is a reasonable basis to believe or suspect that the subject merchandise is being sold, or is likely to be sold, at LTFV. *See* 19 U.S.C.§ 1673b(b); 19 C.F.R.§ 353.15 (1997). This triggers an opportunity for the affected parties to participate actively in the process, after which Commerce proceeds to make its final determination. *See* 19 U.S.C. § 1673d(a); 19 C.F.R.§ 353.20 (1997). Both the preliminary and final determinations are based on information presented to or obtained by Commerce during the course of the proceeding. *See* 19 U.S.C.§ 1516a(b)(2) (1994). Commerce may not base its decision on information outside the record. *See id.* Thus, even if Commerce is exposed to improper influences outside the record, it is prohibited from acting upon them.

There are also statutory and regulatory protections for importers. Commerce is required by statute to hold a hearing

at the request of any interested party prior to its final determination. *See* 19 U.S.C. § 1677c (1994); 19 C.F.R. § 353.38(b) (1997). Commerce is required by statute to address the arguments made at the hearing regarding the proper methodology for the dumping calculation. *See* 19 U.S.C. § 1677f(i)(3)(A) (1994). An interested party is also not limited to giving oral testimony. The antidumping statute permits a party to an investigation to submit written materials, it requires Commerce to consider such materials and, if Commerce finds them to be deficient, to afford the importer the opportunity to supplement its submission. *See* 19 U.S.C. §§ 1677m(d)-(e) (1994). Interested parties also have the opportunity to submit factual information to rebut, clarify, or correct the submissions of another interested party. *See* 19 C.F.R. § 353.31 (1997). Additionally, Commerce is required to "verify all information relied upon in making a final determination of an investigation." 19 U.S.C. § 1677m(i)(1) (1994); 19 C.F.R. § 353.36(a)(i) (1997). Though there is no way to prevent a government official bent on doing mischief from secretly prejudging a matter, these elaborate procedural protections substantially reduce the likelihood that such prejudgment will survive. *See Withrow*, 421 U.S. at 54.

We are particularly reluctant to hold Commerce to the stringent prejudgment standard advocated by NEC in light of the two stages of an investigation. Because Commerce must publish its preliminary results, it must take an initial public position on the disputed issues in the investigation. However, because interested parties are given the opportunity to comment on those results, and because Commerce is required to respond to them, it is not uncommon for Commerce to modify its position between the preliminary determination and

the final determination.[4] Therefore, in an antidumping investigation, "[t]he risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently grave possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position." *Withrow*, 421 U.S. at 57. Were we to impose a strict prejudgment standard, we risk upsetting this intricate system that Congress developed in exercising its broad power over foreign commerce. The fact that the final decision maker in this case – Mr. LaRussa – was to a large extent insulated from the earlier machinations within the Department weighs importantly against the fixed mindset thesis.

The judiciary also provides an independent check on Commerce. An importer may appeal from Commerce's final determination to the United States Court of International Trade. *See* 28 U.S.C. § 1581(c) (1994); 19 U.S.C.§ 1516a(a)(2)(B)(i) (1994). That court reviews Commerce's determination for substantial evidence. *See* 19 U.S.C.§ 1516a(b)(1)(B)(i) (1994). If the importer is dissatisfied with that result, it can appeal the court's final decision to this court, *see* 28 U.S.C. § 1295(a)(5) (1994), where we again apply the substantial evidence test to Commerce's decision, *see Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556,

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[4] *Compare Certain Parts From Italy*, 61 Fed. Reg. 1,344, 1,351 (Dep't Commerce 1996) (preliminary determination of 22%) *with* 61 Fed. Reg. 42,231, 42,232 (final determination of 0%); *compare Polyvinyl Alcohol From the People's Republic of China*, 60 Fed. Reg. 52,547, 52,649 (Dep't Commerce 1995) (preliminary determination of 187.56%) *with* 61 Fed. Reg. 14,057, 14,063 (final determination of 0%); *compare Manganese Metal From the People's Republic of China*, 60 Fed. Reg. 37,875 (amended preliminary determination of 82.44%) with 61 Fed. Reg. 4,415, 4,418 (amended final determination of 0%).

1559 n.10 (Fed. Cir. 1984); *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1392-93 (Fed. Cir. 1997).[5] The availability of this level of review significantly lessens the risk that an impermissible bias will infect Commerce's decision-making process, or if it does, that such a decision will withstand scrutiny.

3.

NEC has failed to demonstrate that the decision maker, here Mr. LaRussa, was not capable of judging this particular controversy fairly on the basis of its own circumstances. Each of the statements that NEC points to as evidence of prejudgment were qualified. Ms. Esserman's oral advice given to NSF at the May 13 meeting, according to the testimony of Mr. Rudolph, NSF's general counsel, who was in attendance, "was based on the preliminary analysis as understood to date." Mr. Mannion's contemporaneous letter to UCAR, in which he referred to Commerce's analysis as "constructive" and its conclusion "preliminary," supports this. Although someone on her staff prepared an outline for her presentation that purported to summarize Commerce's "find[ing] that dumping is occurring at significant levels, ranging from approximately 100-300 percent," Ms. Esserman testified that she did not use these "talking points" at the May 13th meeting because she thought they were "inappropriate." The trial court credited her testimony; and we cannot say this was error.

Neither the Predecisional Memorandum nor the Joffe letter will support the weight NEC places upon them. The

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[5] *But see Zenith Elecs. Corp. v. United States*, 99 F.3d 1576, 1583 (Fed. Cir., 1996) (Rader, J., concurring) (suggesting that the standard articulated in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951) is the more appropriate standard of review).

Joffe letter on its face is equivocal, using words of qualification such as "estimated," "could," and "likely." The Predecisional Memorandum is not definitive. The title itself suggests that the results contained therein were made prior to any formal analysis, and that any conclusions stated were intended to precede the decisional process. The memorandum was not based on NEC's actual cost data, but on data contained in public and other governmental sources. The marketing costs, for example, were based on "Industry standards," not on actual NEC cost data. The cost figures, which would likely be the most critical disputed factual issues in an actual antidumping investigation, were listed as "estimates." There is nothing in the memorandum or the accompanying letter that indicates that Commerce would not reconsider these figures once they were presented with actual data. Accordingly, they do not either separately or cumulatively establish that Mr. LaRussa's mind was "irrevocably closed."

NEC argues that once Commerce had to justify its analysis to Congress, that "backed the Department further into a corner, and dragged Mr. LaRussa there with it." *Brief of Plaintiffs-Appellants* 34. We are not persuaded. The statements made by Commerce officials in their briefings to Congress were not of a nature or made in such context as "to raise a sufficiently grave possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position." *Withrow*, 421 U.S. at 57. Congress, and presumably its staff, know how the antidumping laws work. At the time the briefings took place, it no doubt knew that no preliminary, let alone final, determination had been made. Whatever doubt there was about this was assuaged by Mr. Taverman's testimony, who testified that he spoke in broad, qualified generalities, not

precise terms. Neither Mr. Taverman, Ms. Esserman, nor any other Commerce official made the type of unequivocal statement that would establish that Commerce had made up its mind. Accordingly, NEC has failed to satisfy its burden to prove that Mr. LaRussa was incapable of judging this particular controversy fairly on the basis of its own circumstances.

C.

Finally, NEC asserts that the trial court erred in limiting the testimony of Mr. LaRussa and Mr. Eizenstat. We review such evidentiary rulings for abuse of discretion. *See Heat & Control Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1022 (Fed. Cir. 1986). No such abuse of discretion has been shown. The trial court permitted discovery of Mr. LaRussa and Mr. Eizenstat in the form of written interrogatories. In light of Mr. LaRussa's ongoing involvement in the supercomputer investigation and Mr. Eizenstat's high-ranking position, we agree with the trial court that such limitations were appropriate in order to protect the deliberative process from undue interference. *See Morgan*, 313 U.S. at 422; *In re Office of Inspector General*, 93 F.2d 276, 278 (5th Cir. 1991); *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) (absent "extraordinary circumstances," high agency officials should not "be called to testify regarding their reasons for taking official action").

D.

Our conclusion that NEC has failed to establish an invalidating prejudgment on the part of the government officials involved is not a statement that the conduct of these officials is to be emulated. But for the fortuitous intervention at the final stages of the process of a different decision maker the outcome could well have been different. Thus NEC is not

without grounds for feeling aggrieved. Presumably it entered into the competition for the UCAR contract on the supposition that the vendor with the best product for the lowest cost would win. Then it ran into a high-level political buzz-saw apparently motivated by a desire to protect a domestic industry. But the entire system that Congress has established under the Tariff Acts is designed to protect domestic industries from "unfair" foreign competition, and that is a policy decision that the Constitution places in Congress' hands. The law requires that, in implementing that policy, the administrative decision maker play the game within the rules Congress has established, and that means making final decisions by applying the law to the facts before the agency, not on the basis of xenophobic arguments or distorted facts.

In this case, NEC chose to withhold whatever facts it might have favorable to its cause, and to allow Commerce to proceed to its final decision on the basis of the available information. That decision, which found dumping to be present with regard to certain supercomputers, including NEC's, is now up for review on the merits. NEC will have whatever opportunity is open to it to challenge Commerce's determination on the merits.

It is hard to argue with the proposition that it would have been preferable for Commerce to await a request in the usual course before inserting itself into the UCAR procurement, if for no other reason than that this lawsuit would have been avoided. That Commerce yielded to pressure to get involved at a preliminary stage in the matter does not alone establish that the final outcome was pre-ordained. After a thorough review of all the events, and weighing their implications in light of the policies represented in the Tariff Acts, we are not persuaded that the process here fell so short.

CONCLUSION

The judgment of the United States Court of International Trade is

AFFIRMED.

COSTS

Each party to bear its own costs.

APPENDIX B

UNITED STATES COURT
OF INTERNATIONAL TRADE

NEC CORPORATION and
HNSX SUPERCOMPUTERS, INC.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF COMMERCE, *et al.*,

Defendants,

and

CRAY RESEARCH, INC.,

Defendant-Intervenor.

BEFORE: Pogue, Judge

Court No. 96-10-02360

Slip Op. 97-117

[Judgment entered for Defendants.]

August 20, 1997

Paul, Weiss, Rifkind, Wharton, & Garrison (Robert E. Montgomery, Jr., Terence J. Fortune, Robert P. Parker, David J. Weiler, Swati Agrawal) for Plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director; *Sharon Y. Eubanks*, Deputy Director, *A. David Lafer*, Attorney, *Jeffrey M. Telep*, Attorney, U.S.

Department of Justice, Civil Division, Commercial Litigation Branch; *Patrick V. Gallagher*, Attorney-Advisor, *Lucius B. Lau*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for Defendant.

Wilmer, Cutler & Pickering (*John D. Greenwald, Michael L. Burack, Charles S. Levy, Brigida Benitez, Stuart M. Weiser*) for Defendant-Intervenor.

OPINION

POGUE, Judge: Plaintiffs NEC Corp. and HNSX Supercomputers, Inc.(collectively, "NEC") commenced this action to enjoin the United States Department of Commerce ("Commerce") from conducting an antidumping investigation of *Vector Supercomputers from Japan*. NEC claims that Commerce prejudged the investigation.

Defendant moved to dismiss NEC's complaint for lack of jurisdiction and for failure to state a claim. *See* USCIT Rs. 12b (1) and (5). The Court denied Defendant's motion and entered an expedited trial schedule, with the intent to consolidate the preliminary injunction hearing with the trial on the merits. *NEC Corp. v. United States*, Court No. 96-10-02360 (Mem. Op. and Order, Dec. 18, 1996).

Subsequently, the Court defined the scope of discovery and scheduled document production and depositions. *See NEC Corp. v. United States*, 21 C.I.T. ____, 958 F. Supp. 624 (CIT 1997).[1] On March 4, 1997, the Court issued a protective order for documents produced by Defendant that were

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[1] Prior to issuance of the Court's February 12, 1997, Discovery Order, Defendant petitioned the Court of Appeals for the Federal Circuit for a writ of mandamus to quash the Court's discovery order rendered at the conclusion of several telephone conferences. *See* Tr. of Jan. 8, 1997, Tel. Conf. (# 040); Tr. of Jan. 15, 1997, Tel. Conf. (# 053); Tr. of Jan. 24, 1997, Tel. Conf. (# 062). The Federal Circuit denied the writ application.

covered by certain statutory privileges, the attorney-client privilege, the "state secrets privilege," and the "official information" (or "deliberative process") privilege. *See NEC Corp. v. United States*, Court No. 96-10-02360 (Order, Mar. 4, 1997). The impending issuance of a preliminary determination in the underlying antidumping investigation prevented consolidation of the preliminary injunction hearing with the trial on the merits. The preliminary injunction hearing was held on March 14, 1997. On March 21, 1997, the Court denied NEC's application for a preliminary injunction. *See NEC Corp. v. United States*, Court No. 96-10-02360, (Mem. Op. and Order on Pls.' Mot. for Prelim. Inj., Mar. 21, 1997).

On April 7, 1997, Commerce issued its preliminary determination. *See Vector Supercomputers from Japan*, 62 Fed. Reg. 16,544, 16,547 (Dep't Commerce 1997) (prelim. determ.). NEC did not respond to the investigation questionnaire, citing the instant action as the reason for nonparticipation. *Id.* at 16,545. Without NEC's price information and cost data, Commerce used the "facts otherwise available"[2] to calculate a 454 percent dumping margin for NEC. *Id.*

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[2] *See* Section 776 of the Tariff Act of 1930, as amended 19 U.S.C.§ 1677e(a)(2)(B) ("If an interested party . . . fails to proved such information by the deadlines for submission of the information . . . the administering authority . . . shall, . . ., use the facts otherwise available in reaching the applicable determination under this subtitle."). All further citations to the antidumping statute are to the section in Title 19 of the U.S. Code.

The Court conducted a three-day trial on April 14, 15, and 21, 1997, to determine whether Commerce had prejudged the supercomputer investigation.[3]

STRUCTURE AND ADMINISTRATION OF THE ANTIDUMPING STATUTE

The United States antidumping statute bifurcates investigations between two different federal agencies: the Department of Commerce, which makes less than fair value determinations for a class or kind of foreign merchandise; and the International Trade Commission ("ITC"),[4] which makes injury determinations.[5] If Commerce determines that a class or kind of foreign merchandise is being, or is likely to be sold in the United States at less than its fair value ("LTFV," i.e., at a price which is lower than the price at which the merchandise is sold in the country of exportation or to a third country), and the ITC determines that an industry in the United States is materially injured or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of the subject merchandise, Commerce issues an antidumping order directing the United States Customs Service to collect antidumping duties equal to the amount by which the normal

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[3] The Court wishes to acknowledge the considerable efforts throughout this litigation of counsel for all parties; their cooperation in assembling the record was especially appreciated.

[4] The International Trade Commission is an independent federal agency with investigative powers on trade matters. *See* 19 U.S.C. § 1332 (1994).

[5] NEC's suit does not encompass the ITC investigation. NEC participated in the ITC's injury investigation. *See Vector Supercomputers from Japan*, 61 Fed. Reg. 50,331 (ITC 1996) (prelim. injury determ.). What NEC challenges here is Commerce's ability to make the less than fair value determination.

value (i.e., the price in the foreign market) exceeds the export price (i.e., the U.S. price) for the merchandise. 19 U.S.C. § 1673 (1994). That amount is the dumping margin. 19 U.S.C. § 1677(35) (A) (1994).

The antidumping law requires the Secretary of Commerce, or any other officer to whom the responsibility for carrying out the duties of the statute are transferred, to administer antidumping investigations. *See* 19 U.S.C.§ 1677(1) (1994). Antidumping investigations may be commenced in two ways. An interested party may file a petition alleging the elements necessary for an antidumping duty, 19 U.S.C. § 1673a(b), or Commerce may self-initiate an investigation. 19 U.S.C. § 1673a(a); 19 C.F.R.§ 353.11 (1996). Prior to self-initiation, Commerce prepares a "predecisional" analysis of the imports in question based on information available.[6]

Once commenced, the antidumping investigation proceeds through a preliminary and final determination, *see* 19 U.S.C. §§1673b(b), 1673d(a) (1994), unless the ITC issues a negative injury determination. *See* 19 U.S.C.§ 1673d(c) (2), (3). The purpose of the preliminary determination is to determine whether there is a reasonable basis to believe or suspect that the merchandise which is the subject of the investigation is being sold, or is likely to be sold at LTFV. *See* 19 U.S.C.§ 1673b(b) (1994); 19 C.F.R.§ 353.15 (1996). The purpose of the final determination is to determine whether the merchandise which is the subject of the investigation is being or is likely to be sold at LTFV. *See* 19 U.S.C.§ 1673d(a) (1994); 19 C.F.R.§ 353.20. The preliminary and final determinations are based on information presented to or

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[6] *See* Tr. Powell Trial Test. at 188, Ct. Doc. # 177 (Ct. Doc. refers to the document number recorded on the official docket sheet, which is maintained by the Court's Clerk).

obtained by Commerce during the course of the proceeding. 19 U.S.C.§ 1516a(b) (2) (1994) Information not placed on the record may not influence the outcome of the investigation, *see id.*, or be considered for purposes of judicial review. *See Beker Indus. Corp. v. United States*, 7 C.I.T. 313, 315-18 (1984).

The statute requires Commerce to hold a hearing upon the request of any interested party to the investigation prior to its final determination, *see* 19 U.S.C. § 1677c (1994); 19 C.F.R. § 353.38(b) (1996), and requires Commerce to address, in the final determination, arguments made at the hearing regarding the proper methodology for the dumping calculations at issue. *See* 19 U.S.C. § 1677f(i) (3) (A) (1994).

The statute also requires Commerce to consider information submitted by parties to an investigation, to inform a party if its submission in response to Commerce's request for information is deficient, and to provide the submitting party with an opportunity to remedy or explain its submission. *See* 19 U.S.C. § 1677m(d) (1994).

The statute further requires Commerce to consider information that is submitted by an interested party and is necessary to the preliminary or final determination if (1) the information is submitted within the deadline for its submission, (2) the information can be verified, (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting Commerce's requirements, and (5) the information can be used without undue difficulties. *See* 19 U.S.C. § 1677m(e) (1994).

Additionally, the statute requires Commerce to "verify all information relied upon in making a final determination of an

investigation." 19 U.S.C § 1677m(i)(1) (1994); 19 C.F.R. § 353.36(a) (i) (1996).

Congress intended antidumping investigations to be "transparent." *See* S. Rep. No 96-246, at 38, 41 (1979), *reprinted in* 1979 U.S.C.C.A.N. 424, 427.[7] Included in the record of the proceedings is a record of any ex parte meeting between interested parties, (or other persons providing factual information in connection with a proceeding), and the person charged with making the determination, (or any person charged with making a final recommendation to that person), in connection with that proceeding. *See* 19 U.S.C. § 1677f(3) (1994); 19 C.F.R. § 353.35 (1996). Interested parties have the opportunity to submit factual information to rebut, clarify, or correct the factual submissions of another interested party. *See* 19 C.F.R. § 353.31(2) (1996). Interested parties also may submit case briefs that present their arguments on issues relevant to the final determination. *See* 19 C.F.R. § 353.38(2) (1996).

Commerce addresses issues prior to and again following the preliminary determination.[8] Commerce re-examines its

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[7] "Other significant changes in existing law adopted in this title included . . . greater transparency of investigations," S. Rep. No 96-246, at 38 (1979), *reprinted in* 1979 U.S.C.C.A.N. 424; "The major common elements of the [Subsidies Agreement and the Antidumping Code] are: . . . 3. Provisions for 'transparency' in all phases of a . . . dumping case, ..." *Id.* at 41, *reprinted in* 1979 U.S.C.C.A.N. 427. *See also* H. Rep. No. 96-317, at 45 (1979) ("With the rise in the number of foreign antidumping proceedings by Code parties, . . ., the United States has become increasingly concerned that other countries utilize open public proceedings, similar to those in the United States, to ensure importers and exporters are treated fairly.").

[8] *See* Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 222-23.

analysis between the preliminary and the final determination.[9] The investigation may produce a dumping margin in a preliminary determination that is different from the margin forecast in a self-initiated predecisional analysis (or alleged in a petition pursuant to which an investigation was initiated), and the dumping margin in the final determination may differ significantly from the dumping margin in the preliminary determination.[10]

Judicial review of Commerce's final determination is available in the U.S. Court of International Trade. *See* 28 U.S.C. § 1581(c);[11] 19 U.S.C. § 1516a(a) (2) (B) (i) . The

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[9] *Id.* at 223, 236.

[10] *Id.*; *Compare Certain Pasta From Italy*, 61 Fed. Reg. 1,344, 1,351 (Dep't Commerce 1996) (prelim. determ.) (22.15%), *with* 61 Fed. Reg. 42,231, 42,232 (final determ.) (0.00%); *compare Polyvinyl Alcohol From the People's Republic of China*, 60 Fed. Reg. 52,547, 52,649 (Dep't Commerce 1995) (prelim. determ.) (187.56%), *with* 61 Fed. Reg. 14,057, 14063 (final determ.) (0.00%); *compare Manganese Metal From the People's Republic of China*, 60 Fed. Reg. 37,875 (Dep't Commerce 1995) (amend. prelim. determ.) (82.44%), with 61 Fed. Reg. 4,415, 4,418 (amend. final determ.) (0.97%).

[11] The Court exercised jurisdiction over this action pursuant to 28 U.S.C. § 1581(i), the Court's residual jurisdiction provision. *See Asociacion Colombiana de Exportadores de Flores (Asocoflores) v. United States*, 13 C.I.T. 584, 585, 717 F. Supp. 847, 849 (1989). For § 1581(i) jurisdiction to attach, relief under another section (in this case § 1581(c)) must be "manifestly inadequate." *Miller & Co. v. United States*, 5 Fed. Cir. (T) 122, 124, 824 F.2d 961, 963 (1987). In an earlier order, the Court held that requiring exhaustion of administrative remedies, *see* 28 U.S.C. § 2637(d); *B-West Imports, Inc. v. United States*, 880 F. Supp. 853, 858-59 (CIT 1995), would be inappropriate for NEC's claim of prejudgment given that the remedy of disqualification of a biased decisionmaker could be granted at the outset of the investigation, avoiding the need to undo a complicated administrative proceeding if the actionable allegations in NEC's complaint proved to be true. *See NEC Corp. v. United States*, Court No. 96-10-02360 at 3 (Mem. Op. and Order, Dec.

court reviews the determination to insure Commerce's action is in accordance with law and supported by substantial evidence. *See* 19 U.S.C. § 1516a(b) (1) (B) (i).

Subject to any policies and directives the Secretary may prescribe, the authority to conduct investigations and make all determinations in antidumping proceedings has been delegated to the Under Secretary for International Trade, the head of the International Trade Administration, pursuant to Department of Commerce Organization Order 10-3 at § 4.01b.[12] Subject to any policies and directives the Under Secretary may prescribe, the Under Secretary, in turn, has delegated the authority to conduct investigations and make all determinations in antidumping proceedings to the Assistant Secretary for Import Administration. *See* Department of Commerce Organization and Function Order 41-1 Amendment 3 at § 1.01d.[13]

18, 1996) If the matter was in fact prejudged, requiring NEC to submit to an administrative process rendered a hollow formality by the prejudgment, *see infra* p. 29, would not provide an adequate remedy. *See Barry v. Barchi*, 443 U.S. 55, 63 n.10, 99 S. Ct. 2642, 2648 n.10 (1979) ("Under existing authority, exhaustion of administrative remedies is not required when 'the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit.'") (quoting *Gibson v. Berryhill*, 411 U.S. 564, 575, 93 S. Ct. 1689, 1696 (1973)); *McCarthy v. Madigan*, 503 U.S. 140 148, 112 S. Ct. 1081, 1088 (1992) (stating that exhaustion of administrative remedies may not be required "where the administrative body is shown to be biased or has otherwise predetermined the issue before it.").

[12] The Department of Commerce Organization Order is publicly available through the Commerce Department, but not separately published in any secondary source.

[13] The Department of Commerce Organization and Function Order is publicly available through the Commerce Department, but not separately published in any secondary source.

The Assistant Secretary for Import Administration is the head of Import Administration. The Assistant Secretary exercises the functions of the Under Secretary and the administering authority under the U.S. antidumping law, including responsibility for the initiation of investigations, and for ensuring the proper administration of the antidumping laws. *See* Department of Commerce Organization and Function Order 41-1 at § 2. By virtue of this delegation, the Assistant Secretary for Import Administration is the decisionmaker in antidumping investigations. The Assistant Secretary for Import Administration reports to the Under Secretary of Commerce for International Trade. The Under Secretary may give general policy guidance to the Assistant Secretary regarding administration of the antidumping statute, but is not involved in the conduct of, or the determinations issued in connection with, specific investigations. *See* Department of Commerce Organization and Function Order 41-1, Amendment 3 at § 1.01d.

As head of Import Administration, the Assistant Secretary for Import Administration supervises Import Administration staff. Since June 4, 1996, Import Administration staff have been organized into three Antidumping and Countervailing Duty Groups, each of which is headed by a Deputy Assistant Secretary. *See* Department Organization and Function Order 41-1 at § 2.04b. Antidumping investigations are managed on a day-to-day basis by an Import Administration investigation team that works under a Deputy Assistant Secretary.[14] Each

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[14] Each Deputy Assistant Secretary is responsible for managing the antidumping proceedings assigned to their respective groups and each reports directly to the Assistant Secretary for Import Administration. *See* Department of Commerce Organization and Function Order 41-1 at § 2.04. The antidumping investigation of Vector Supercomputers from Japan is being conducted by members of Antidumping and Countervailing Duty Enforcement Group I. Uncontested Fact ¶ 61, *NEC Corp. v. United*

investigation team normally is comprised of one or more import compliance specialists, one or more accountants, an attorney, and a policy analyst.[15] The team is supervised by the Office Director and may have a team leader.[16] The accountant, attorney and policy analyst are assigned by their respective offices.[17] For accounting, legal, and policy issues, the attorney, the accountant, and the policy analyst report directly to their respective supervisors.[18] The team solicits, collects and analyzes information submitted for the record of the investigation and presents issues to the Assistant Secretary for decision, along with the team's recommendations on those issues.[19]

States, Court No. 96-10-02360 (Pretrial Order at 22, Apr. 11, 1997) (hereinafter UF ¶ ___, Pretrial Order at ___). To begin an antidumping investigation, the Deputy Assistant Secretary assigns the petition (or the task of doing a self-initiation predecisional analysis) to an Office Director who, in turn, selects Import Compliance Specialists to work on the investigation. UF ¶68, Pretrial Order at 26. Within each Antidumping and Countervailing Duty Enforcement Group are three AD/CVD Enforcement Offices. Mr. Gary Taverman is the Office Director responsible for the investigation team assigned the antidumping investigation of Vector Supercomputers from Japan. This team includes Mr. Edward Easton, Ms. Sunkyu Kim, and other Import Compliance Specialists, as necessary, in Mr. Taverman's Office of Antidumping and Countervailing Duty Enforcement II. UF ¶ 62, Pretrial Order at 22-23.

[15] UF ¶ 68, Pretrial Order at 26.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Investigation teams "analyze petitions submitted by manufacturers, producers, trade associations, and unions under the AD/CVD laws; conduct investigations and, for the findings, orders, or agreements under their jurisdiction, the administrative reviews required under the AD/CVD laws, including the determination of product

FACTUAL BACKGROUND

The University Corporation for Atmospheric Research ("UCAR") is a research consortium funded in part by the National Science Foundation ("NSF"), an independent Executive Branch agency of the U.S. Government. In March 1995, UCAR initiated a bidding process to procure advanced supercomputers.[20] As a result of this process, three companies—Federal Computing Corporation ("FCC"), supplying vector supercomputers produced by NEC Corporation ("NEC"), Cray Research, Inc. ("Cray") and Fujitsu Limited ("Fujitsu")—were invited to submit a "best and final offer."[21]

Guided by its obligation to assure that the procurement process was free of "noncompetitive practices,"[22] on or about March 3, 1996, NSF instructed UCAR to obtain evidence that no dumping was involved in NEC's offer to supply UCAR.[23] In response to NSF's directive, UCAR commissioned Dr. Lloyd Thorndyke to prepare an analysis of NEC's offer.[24]

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definitions and the drafting and presentation of questionnaires, analysis of responses to questionnaires and the conduct of on site verification of the accuracy and completeness of responses; . . . [and] prepare recommendations regarding the disposition of individual AD/CVD investigations and reviews." Department of Commerce Organization and Function Order 41-1 at § 2.04b.

[20] UF ¶ 1, Pretrial Order at 7.

[21] UF ¶ 2, Pretrial Order at 7.

[22] UF ¶ 19, *Id.* at 12.

[23] Tr. Rudolph Trial Test. at 380, Ct. Doc. # 179; *see also* UF ¶ 6, Pretrial Order at 8.

[24] UF ¶ 7, Pretrial Order at 8.

Dr. Thorndyke's analysis concluded that NEC's offer did not involve dumping.[25]

NSF did not request Commerce to undertake a dumping analysis of the UCAR procurement.[26] Nevertheless, in contemplating a self-initiated dumping investigation, *see* 19 U.S.C. § 1673a(a)(1) (1994), Commerce undertook a preliminary analysis of NEC's bid.[27]

Specifically, on April 3, 1996, Ms. Susan Esserman, Assistant Secretary of Commerce for Import Administration, assembled a team of Import Administration officials to collect information and analyze the possibility that NEC's offer of supercomputers to UCAR might involve dumping.[28]

On April 24, 1996, Ms. Esserman convened an interagency meeting to obtain technical information on supercomputers and hear a presentation by NSF on the UCAR procurement.[29]

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[25] UF ¶ 8, *Id.*

[26] Am. Answer ¶ 28, Hr'g Exs. and Docs., Vol 2, Tab 33 at 8; Tr. Powell Trial Test. at 168, Ct. Doc. # 177.

[27] Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 135, 162, 179, 185; Powell Dep., Hr'g Exs. and Docs., Vol. 4, Tab 72 at 45; *see also* Tr. Powell Trial Test. at 168, 188-192, Ct. Doc. # 177.

[28] UF ¶ 13, Pretrial Order at 13; *see also* Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 177.

[29] First Esserman Decl. ¶ 9, Hr'g Exs. and Docs., Vol. 1, Tab 16 at 2-3; Commerce Admissions ¶ 16, Hr'g Exs. and Docs., Vol. 2, Tab 34 at 6-7; McPhee Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 65; Tr. Eleanor Lewis Trial Test. at 72-77, Ct. Doc. # 177.

On May 2, 1996, Ms. Esserman became Commerce's Acting General Counsel.[30] In early May, Mr. Paul Joffe became the Acting Assistant Secretary for Import Administration.[31] On May 13, 1996, Ms. Esserman convened an interagency meeting with senior officials of NSF and other agencies to discuss the results of Commerce's preliminary analysis of NEC's UCAR bid. Attendees at the meeting included, *inter alia*: Ms. Esserman, Paul L. Joffe, Eleanor R. Lewis,[32] Gary Taverman,[33] John N. McPhee,[34] Mary Good,[35] Stephen J. Powell, Jr.,[36] Dr. George Cotter,[37] Dr. Neal Lane, the director of NSF, and Lawrence Rudolph, NSF's General Counsel.[38] The specifics of the May 13th meeting are discussed *infra* pp. 42-45.

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[30] UF ¶ 16, Pretrial Order at 10.

[31] UF ¶ 17, *Id.*

[32] Chief Counsel for International Commerce, Office of the General Counsel ("OGC")/DOC. *Id.*

[33] Office Director, Enforcement Group I, IA/ITA/DOC. *Id.* at 3.

[34] Director of Department's Office of Computers and Business Equipment, Trade Development ("TD")/ITA/DOC. The office is responsible for monitoring developments in the computer industry, including software and software aspects, and working with the industry and trade associations and other parts of the government to stimulate export sales. UF ¶ 12, Pretrial Order at 9. Mr. McPhee has been employed at the Commerce Department for over twenty years, and is in frequent contact with Cray on a variety of matters as part of his official duties. *Id.*

[35] Under Secretary for Technology, DOC. Def.'s Resp. to Ct. Ordered Disc., Hr'g Exs. and Docs., Vol. 2, Tab 32 at 4.

[36] Chief Counsel, IA/ITA/DOC. *Id.*

[37] Chief Scientist, National Security Agency. *Id.*

[38] UF ¶ 18, *Id.* at 11.

On May 17, 1996, Ambassador Stuart Eizenstat, Under Secretary for International Trade, and Ms. Esserman met with Daniel K. Tarullo of the National Economic Council to discuss the UCAR procurement.[39] The meeting was limited to a short factual briefing of the UCAR procurement and Import Administration's inquiry into the matter.[40]

Also on May 17, 1996, Mr. Brian Mannion, Grants and Agreements Officer of NSF, wrote to Mr. William Rawson, Vice President of UCAR,[41] and stated, *inter alia*:

> Under the Cooperative Agreement between UCAR and NSF, UCAR is required to obtain NSF's approval before UCAR enters into the agreement to acquire the supercomputing capacity that is the subject of this procurement. In purchasing this supercomputer capacity, UCAR must observe the procurement standards set forth in Office of Management and Budget Circular A-110, *Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations*, which was incorporated by reference in section 2b of

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[39] Esserman Prelim. Inj. Test., Hr'g Exs. And Docs., Vol. 2, Tab 38 at 160; Decl. of Mary Good at 2, Under Secretary of Technology, DOC, Ct. Doc. ¶ 164.

[40] *Id.* at 161-163; *id.* at 2-3. Having received the testimony of Ms. Esserman, as well as the Declaration of Mary Good, two attendees of the May 17, 1996, meeting, the Court did not require testimony at trial by Mr. Eizenstat to establish the substance of the meeting. *See Warzon v. Drew*, 155 F.R.D. 183, 185 (E.D. Wis. 1994) (obtaining involuntary testimony of high ranking government officials requires that the "evidence must not be available through an alternative source or via less burdensome means.") The Esserman testimony and the Good declaration were sufficient alternative sources of the evidence.

[41] UF ¶ 19, Pretrial Order at 12.

clause I of the general provisions of the Cooperative Agreement. Among other things, those standards require that:

> All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade.

As you know, NSF has been concerned about the possibility that one or more of the proposals could give rise to the imposition of an "antidumping duty" . . .

UCAR has provided NSF with several documents that addressed the "antidumping" issue. Subsequently, officials at the Department of Commerce, which has statutory responsibility for administering relevant provisions of the antidumping laws, have advised NSF that they have performed a "constructive analysis" of the proposal with the best performance characteristics. They have reached the preliminary conclusion that the proposal does not constitute an offer at "fair value."

As you enter into final negotiations with the firm that in UCAR's judgment has submitted the best proposal, we remain concerned about the dumping issue. Prior to approving this award, therefore, NSF will require that UCAR has given this issue due consideration and that UCAR has obtained sufficient documentation to demonstrate that the proposal does not reflect any "noncompetitive practices among

contractors that may restrict or eliminate competition or otherwise restrain trade" in violation of the antidumping laws.[42]

On May 20, 1996, UCAR announced that it had selected for final contract negotiations FCC's bid to supply a system of four NEC 32 processor SX-4 vector supercomputers for $35.25 million. UCAR found that the NEC systems offered by FCC "provide a distinct technical advantage compared to the systems offered by the other vendors."[43]

On May 20, 1996, Commerce transmitted to NSF a letter from Acting Assistant Secretary Joffe to Dr. Lane, Director of NSF, (the "Joffe Letter") stating that "using standard methodology prescribed by the dumping law" Commerce had "estimated" that NEC's bid to supply UCAR was below cost, and that the dumping margin on NEC's UCAR bid "is likely to be very high," and further, that UCAR's acquisition of NEC supercomputers "could have a serious adverse impact on the domestic industry's efforts to develop a more advanced version of the supercomputer system to be supplied."[44] The Joffe Letter also stated that a formal antidumping investigation could be self-initiated by Commerce or initiated pursuant to an antidumping petition.[45] The Secretary of Commerce approved the delivery of the "Joffe Letter" to NSF.[46]

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[42] Hr'g Exs. and Docs., Vol. 1, Tab 23.

[43] UF ¶ 10, Pretrial Order at 8 (quoting UCAR May 20, 1996, Press Release).

[44] Hr'g Exs. and Docs., Vol. 1, Tab 14.

[45] UF ¶ 23, Pretrial Order at 12-13; *see also* Hr'g Exs. and Docs., Vol. 1, Tab 14.

[46] Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 175-76.

On the same date, Mr. Joffe sent a second letter to Dr. Lane transmitting a document entitled "Predecisional Memorandum."[47] The Predecisional Memorandum contained a "Dumping Analysis" that included a specific, estimated "Margin Calculation" ranging from 163.38 to 280 percent.[48] The Predecisional Memorandum was not based on NEC's actual cost and pricing data that would be used to make a formal dumping finding under the statute.[49] Instead, Import administration staff reviewed various sources of information, including estimates of NEC's costs available to the U.S. Government, the Thorndyke Study, and information from NEC financial statements.[50]

For reasons relating to NSF's procurement procedures, NSF requested authorization from Commerce to release the analysis to NEC, UCAR and NCAR.[51] Commerce transmitted the May 20 Predecisional Memorandum to NSF with authorization for NSF to distribute the Memorandum to NEC, UCAR and NCAR as within Commerce's "intended official

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[47] UF ¶ 24, Pretrial Order at 13; *see also* Hr'g Exs. And Docs., Vol. 1, Tab 15.

[48] Hr'g Exs. and Docs., Vol. 1, Tab 15 at 3.

[49] Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 150-51. ("we were involved with a preliminary analysis. . . when you make a preliminary, [19 U.S.C. § 1673b(b)], or a final determination, [19 U.S.C. § 1673d(a)], [there is] a full review of a foreign producer's data, . . ."). Among other things, that review includes verification of the foreign producers' data. *See* 19 U.S.C. § 1677m(i)(1) (1994); 19 C.F.R. § 353.36(a)(i) (1996).

[50] UF ¶ 26, Pretrial Order at 14.

[51] Tr. Powell Trial Test. at 178-82, Ct. Doc. # 177; Tr. Rudolph Trial Test at 384, 417-18, Ct. Doc. # 179.

use."[52] Commerce and NSF agreed that the disclosure of the Predecisional Memorandum to NSF, NEC, UCAR and NCAR was for purposes of the procurement.[53]

Commerce made the Joffe Letter available to the press and public and faxed it directly to Cray on May 20, 1996.[54] It was published in *Inside U.S. Trade* on May 24, 1996.[55] The Predecisional Memorandum was published in *Inside U.S. Trade* on September 13, 1996.[56] There is no evidence of *Inside U.S. Trade*'s source for publication.

On June 4, 1996, Cray executives, accompanied by outside counsel, met with Import Administration staff for pre-petition counseling.[57]

On June 5, 1996, Robert LaRussa, who had no prior involvement in the issues relating to the UCAR procurement, succeeded Mr. Joffe as Acting Assistant Secretary of Commerce for Import Administration.[58] On June 7, 1996, Mr. LaRussa was briefed by Mr. Taverman on the predecisional analysis and the dissemination and general content of the Predecisional Memorandum.[59] He also read the Joffe Letter at

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[52] Joffe Transmittal Letter, Hr'g Exs. and Docs., Vol. 1, Tab 15; *see also* Tr. Powell Trial Test. at 185, Ct. Doc. # 177; Tr. Rudolph Trial Test. at 400, Ct. Doc. # 179.

[53] *Id.*

[54] UF ¶ 29, Pretrial Order at 14.

[55] UF ¶ 30, *Id.*; *see also* Hr'g Exs. and Docs., Vol. 2, Tab 55.

[56] Hr'g Exs. and Docs., Vol. 2, Tab 55.

[57] UF ¶ 41, Pretrial Order at 17.

[58] UF ¶ 32, Pretrial Order at 15.

[59] Suppl. LaRussa Interrog. Resp. 2, Hr'g Exs. and Docs., Vol. 2, Tab 37 at 3-4; Taverman Dep., Hr'g Exs. and Docs., Vol. 4, Tab 73 at 42-47.

that time.[60] Mr. LaRussa did not read the predecisional dumping analysis.[61]

Mr. LaRussa has had no communication with Mr. Eizenstat or Ms. Esserman relating to the preparation, dissemination, purpose, or content of the Predecisional Memorandum; neither Ms. Esserman nor Mr. Eizenstat had communicated to Mr. LaRussa their views on Cray's antidumping petition; and Mr. Eizenstat gave Mr. LaRussa only general guidance to observe all standard applicable procedures in the pending investigation of vector supercomputers from Japan.[62]

On June 6, 1996, Mr. Joffe, then a Senior Advisor to the Assistant Secretary for Import Administration, Mr. Powell, and Mr. Taverman, met with Democratic staff members from the House of Representatives Science Committee to discuss the UCAR procurement. Mr. Taverman explained the predecisional analysis and the resulting estimated dumping margins.[63]

On June 10, 1996, Ms. Esserman, Mr. Joffe, Mr. LaRussa, Mr. Powell, and Mr. Taverman met with staff members of the House Ways and Means Committee and Senate Finance Committee, at the request of one of the staff members, to discuss the UCAR procurement. Mr. Taverman again explained the predecisional analysis and the estimated

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[60] Suppl. LaRussa Interrog. Resp. 2, Hr'g Exs. and Docs., Vol. 2, Tab 37 at 3.

[61] *Id.*

[62] Suppl. LaRussa Interrog. Resp. 2, 3, 6, Hr'g Exs. and Docs., Vol. 2, Tab 37 at 3, 6, 11- 12.

[63] UF ¶ 33, Pretrial Order at 15. The Predecisional Memorandum was not given to the Congressional staff members.

dumping margins.[64] Acting Assistant Secretary LaRussa did not make any presentation or ask or answer any questions at the June 10 meeting.[65]

On June 11, 1996, Ms. Esserman, Mr. Powell, Mr. Joffe, Mr. Taverman, and Mr. LaRussa met with Representative David E. Skaggs,[66] at his request, to discuss the UCAR procurement. They explained the antidumping process to Congressman Skaggs, and Mr. Taverman explained in general terms the predecisional dumping analysis.[67]

On June 20, 1996, Mr. Rawson of UCAR wrote to Mr. Mannion at the NSF to state that, in response to NSF's May 17 letter, UCAR had asked FCC/HNSX/NEC to comment upon Commerce's May 20, 1996, Predecisional Memorandum and also had retained its own legal and economic experts to evaluate the FCC/HNSX/NEC response as well as Commerce's Predecisional Memorandum.[68]

UCAR concluded, based on its information, that the FCC/HNSX/NEC offer to supply four of NEC's SX-4 32 processor supercomputers was not at less than fair value.[69]

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[64] UF ¶ 34, *Id.* The Predecisional Memorandum was not given to the Congressional staff members.

[65] UF ¶ 35, *Id.* at 16.

[66] Representative David E. Skaggs represents the 2nd Congressional District of Colorado which includes Boulder Colorado, where UCAR and NCAR are located. UF ¶ 36, *Id.*

[67] UF ¶ 37, *Id.* Subsequently, the UCAR procurement and Commerce's preliminary analysis were the subject of Congressional debate on an amendment to a House Appropriations Bill. *See* H.R. Rep. 104-628 at 124-129; 142 Cong. Rec. H6905-02 (1996).

[68] UF ¶ 38, Pretrial Order at 16.

[69] UF ¶ 39, *Id.* at 17.

On June 24, 1996, NSF Director Lane forwarded to the Secretary of Commerce, Michael Kantor, Mr. Rawson's letter of June 20, 1996, together with the enclosed cost analyses, asking Secretary Kantor to inform him "in the near future" about Commerce's intentions regarding the self-initiation of an antidumping investigation of supercomputers from Japan.[70] Also on June 24, 1996, NSF General Counsel Rudolph wrote to Ms. Esserman conveying the same cost analyses.[71]

On July 29, 1996, Cray filed an antidumping petition with Commerce and the U.S. International Trade Commission ("ITC") against vector supercomputers from Japan.[72]

On August 2, 1996, NEC wrote to Under Secretary Eizenstat advising him of a request to Commerce's Inspector General for an investigation of the circumstances surrounding the issuance of Commerce's Predecisional Memorandum as well as NEC's claim that Commerce had improperly released NEC's business confidential information to Cray. NEC sought suspension of the antidumping investigation initiated pursuant to Cray's petition, pending the conclusion of the Inspector General's investigation.[73]

On August 14, 1996, Mr. LaRussa received a note from Under Secretary Eizenstat transmitting a letter from NEC's counsel dated August 2, 1996, and instructing Mr. LaRussa to draft a response to a letter from NEC's counsel containing allegations that Commerce Department actions related to its antidumping investigation "may include violations of a Federal

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[70] UF ¶ 40, *Id.*

[71] UF ¶ 42, *Id.*

[72] UF ¶ 43, *Id.*; *see also Vector Supercomputers from Japan*, 61 Fed. Reg. 43,527 (Dep't Commerce 1996) (init. antidumping invest.).

[73] UF ¶ 44, Pretrial Order at 17-18.

criminal statute, applicable Department regulations, and the Due Process Clause of the Constitution."[74]

On August 19, 1996, Commerce initiated the supercomputer investigation.[75] The investigation was assigned to Import Administration's Office of Antidumping and Countervailing Duty Enforcement II.[76]

On August 20, 1996, NSF issued a press release in which Dr. Neal Lane, NSF's Director, stated, *inter alia*:

> In my view, it would be inappropriate for NSF to approve this procurement until the dumping issue has been resolved.
>
> In light of the numerous questions raised about and interest expressed in this procurement, I am pleased that the issue of dumping is being properly addressed by the appropriate federal agencies. The Department of Commerce and the International Trade Commission have the statutory authority, the expertise, and the established procedures to determine whether this offer is being made at less than fair value, and whether it would be injurious to American industry.
>
> I am acutely aware that the National Center for Atmospheric Research (NCAR), which is operated by UCAR, needs state-of-the-art computational equipment to maintain U.S. world leadership in climate modeling research. I feel, however, that acting now on this procurement would be

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[74] *Id.*

[75] *Vector Supercomputers from Japan*, 61 Fed. Reg. 43,527 (Dep't Commerce 1996) (init. antidumping invest.)

[76] UF ¶ 46, Pretrial Order at 18.

inconsistent with the responsible stewardship of taxpayer monies.[77]

On September 12, 1996, the Chairman of the ITC notified the Secretary of Commerce that the Commission had made an affirmative determination in the preliminary injury phase of the antidumping investigation regarding vector supercomputers from Japan,[78] which was published on September 25, 1996, in the Federal Register.[79]

On September 30, 1996, Commerce sent Section A of its antidumping questionnaire to counsel for NEC.[80] The same questionnaire was sent to Fujitsu Limited ("Fujitsu").[81]

On October 15, 1996, NEC sent a letter to Secretary Kantor stating "we have today asked the Court of International Trade to enjoin the Department's continued prosecution of its antidumping investigation of supercomputers from Japan."[82] NEC explained that the reason for this action was that Commerce publicly endorsed "the merits of our competitor's dumping claim before the antidumping investigation was even initiated" and therefore "Commerce has deprived NEC and HNSX of the right to a fair and impartial decision-maker to which they are entitled under the Fifth Amendment of the United States Constitution. Accordingly, [NEC] will respectfully withhold their response to the Department

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[77] UF ¶ 48, *Id.*; *see also* Ex. Q attached to Pls.' Mem. of P.& A. in Supp. of Mot. for Prelim. Inj., Court Doc. # 004.

[78] UF ¶ 49, Pretrial Order at 19.

[79] UF ¶ 51, *Id.*; *see also Vector Supercomputers from Japan*, 61 Fed. Reg. 50,331 (ITC 1996) (prelim. injury determ.).

[80] UF ¶ 52, Pretrial Order at 19.

[81] *Id.*

[82] UF ¶ 53, *Id.* at 19-20.

questionnaire until such time as a qualified independent party, who is impartial and has not already prejudged the matter, is appointed as a 'special master' to conduct the investigation."[83]

As noted above, NEC filed this lawsuit on October 15, 1996 seeking to enjoin Commerce's investigation of vector supercomputers from Japan.

DISCUSSION

NEC's constitutionally based prejudgment claim (seeking disqualification of an administrative decisionmaker) invokes the protections of the Due Process Clause of the Fifth Amendment.[84] *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 46, 95 S. Ct. 1456, 1464 (1975) (reviewing whether combination of investigative and adjudicative functions creates an unconstitutional risk of bias in administrative adjudication). Before an administrative action implicates constitutional due process concerns, however, that action must deprive a party of "life, liberty, or property."[85] Therefore, a prejudgment claim based on the Due Process Clause requires that the court "first determine whether a protected property or liberty interest exists," before determining "what procedures are necessary to protect that interest." *Techsnabexport, Ltd. v. United States*, 16 C.I.T. 420, 426, 795 F. Supp. 428, 435

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[83] *Id.*

[84] U.S. Const. Amend. V.

[85] The Due Process Clause provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. "The [Supreme] Court analyzes each of these three concepts separately; unless an agency action threatens to deprive an individual of something that fits within one of these three categories, the procedures used by the agency are not subject to review under the Due Process Clause." Kenneth Culp Davis & Richard J. Pierce, *Administrative Law Treatise* § 9.4 at 21 (3d ed. 1994).

(1992) (citing *American Ass'n of Exporters & Importers v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985).

The Supreme Court has interpreted Congress' power "to regulate Commerce with foreign nations"[86] to be "so complete . . . that no one can be said to have a vested right to carry on foreign commerce with the United States." *The Abby Dodge*, 223 U.S. 166, 176-77, 32 S. Ct. 310, 313 (1912); *see also* authorities cited in *Arjay Assocs., Inc. v. United States*, 8 Fed. Cir. (T) 16, 18-20, 891 F.2d 894, 896-98 (1989);[87] and

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[86] U.S. Const. Art I, § 8, cl. 3.

[87] *Arjay* cites the following authorities:

Buttfield v. Stranahan, 192 U.S. 470, 493, 24 S. Ct. 349, 354, 48 L. Ed. 525 (1904) ("As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution."); . . . *American Assoc. of Exporters and Importers v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985) ("No one has a protectable interest to engage in international trade."); *Ganadera Indus., S.A. v. Block*, 727 F.2d 1156, 1160 (D.C. Cir. 1984) ("[Ganadera's] due process argument must fail because [Ganadera] has no constitutionally-protected right to import into the United States."); . . . .

The absence of a constitutional right has been recognized in relation to aspects of international trade other than exclusion from importation. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448-49, 99 S. Ct. 1813, 1821-22, 60 L. Ed. 2d 336 (1979); *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 57, 53 S. Ct. 509, 509-10, 77 L. Ed. 1025 (1933) (no violation of federalism in imposition of duty on state importation) ("The Congress may determine what

B-West Imports, Inc. v. United States, 880 F. Supp. 853, 863-64 (CIT 1995). NEC did not identify a specific constitutionally protected interest at stake in the pending antidumping investigation. Indeed, the authorities set forth in Arjay demonstrate judicial caution toward recognition of constitutionally protected interests for matters involving

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articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on foreign commerce with the United States."); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318, 53 S. Ct. 350, 359, 77 L. Ed. 796 (1933) ("No one has a legal right to the maintenance of an existing rate or duty."); *North Am. Foreign Trading Corp. v. United States*, 783 F.2d 1031, 1032 (Fed. Cir. 1986) ("No vested right to a particular classification or rate of duty or preference is acquired at the time of importation."); *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 580, 63 C.C.P.A. 15 (1975); *United States v. Zenith Radio Corp.*, 562 F.2d 1209, 1217, 64 C.C.P.A. 130 (1977), *aff'd*, 437 U.S. 443, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978) ("Not without reason has Congress refrained from spelling out either the precise criteria for determining what shall constitute a bounty or grant and what shall not, or the calculations to be followed in determining net amount. As this court said in *Hammond Lead*, [*United States v. Hammond Lead Prods.*, 440 F.2d 1024, 58 C.C.P.A. 129, *cert. denied*, 404 U.S. 1005, 92 S. Ct. 565, 30 L. Ed. 2d 558 (1971)]: 'In the assessment of a countervailing duty, the determination that a bounty or grant is paid necessarily involves judgments in the political, legislative, or policy spheres,' 440 F.2d at 1030, 58 C.C.P.A. at 137, to which the court might well have added the eminently important economic sphere. Our nation's relationships in the world family are particularly sensitive to the assessment of the additional duties known as 'countervailing' duties. Such assessment is not just a means of protecting our producers, as Congress has recognized in refusing to require proof of injury before making such assessment; it is also one of the chips in a game played by governments on a world stage.").

Arjay, 8 Fed. Cir. (T) at 18-20, 891 F.2d at 896-898

foreign trade or commerce. These cases from the Supreme Court and the Federal Circuit seem to preclude recognition of a constitutionally based prejudgment claim.

The absence of a constitutional claim, however, does not foreclose a statutory claim. A statute defining procedures for submission of information, 19 U.S.C. § 1677m(d) &(e), and for a hearing, 19 U.S.C. § 1677c, "command[s] by implication"[88] that the procedures and hearing be fair, *see Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 321, 53 S. Ct. 350, 360 (1933), and not a "hollow formality."[89] Prejudgment of an antidumping investigation, wherein the decisionmaker has a closed mind at initiation, would undermine the statutory procedures that Congress has prescribed. Recognition of a statutorily based prejudgment claim is therefore appropriate.[90]

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[88] *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 321, 53 S. Ct. 350, 360 (1933).

[89] *Association of National Advertisers, Inc. v. United States*, 627 F.2d 1151, 1187 (D.C. Cir. 1979) (MacKinnon, J., dissenting).

[90] The Court's recognition of a statutorily based prejudgment claim seeking disqualification of a decisionmaker in an antidumping investigation does not extend to recognition of NEC's general claim of "institutional bias" seeking disqualification of the entire Commerce Department based on an alleged bias in favor of a domestic manufacturer. Recognition of an institutional bias claim is appropriate when structural infirmities within a decisionmaking body render it biased as a matter of law. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 578-79, 93 S. Ct. 1689, 1697-98 (1973) (finding that members of the Georgia Board of Optometry who stood to gain from reduced competition resulting from license revocations could not in fairness adjudicate those revocations). Where no comparable structural bias (e.g., "potential conflict of interest or a pecuniary stake in the outcome of the litigation," *Brooks v. New Hampshire Supreme Court*, 80 F.3d 633, 640 (1st Cir. 1996) (citations omitted)) exists, "an entire group of adjudicators cannot be disqualified wholesale solely on the bases of an alleged institutional bias in favor of a rule or policy promulgated by that

By its nature, however, the claim is limited, and the burden for establishing it is heavy. Principles applicable to constitutionally based bias claims are equally applicable to the statutory claim. To begin, administrative decisionmakers enjoy a presumption of honesty and integrity which must be overcome. *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464 (1974) ("The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication . . . must overcome a presumption of honesty and integrity in those serving as adjudicators; . . ."). In evaluating NEC's claim for prejudgment, "the Court starts with the assumption that the decisionmaker, the Assistant Secretary for Import Administration, is a person of honesty and

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group." *Id.* (citing *Doolin Security Savs. Bank v. FDIC*, 53 F.3d 1395, 1407 (4th Cir. 1995) and *Hammond v. Baldwin*, 866 F.2d 172, 177 (6th Cir. 1989)).

The *Doolin* court observed, "Presumably all agencies inherently have some level of 'institutional bias,' but such an interest does not render all agencies incapable of adjudicating disputes within their own proceedings given the strong public interest in effective, efficient, and expert decisionmaking in the administrative setting." *Doolin*, 53 F.3d at 1407. That observation is applicable to Commerce's administration of the antidumping laws. A general allegation of bias in favor of a domestic manufacturer could probably be made in all dumping investigations; this is simply a consequence of enforcing laws intended to remedy the injury caused by less than fair value imports. The fact that domestic manufacturers stand to benefit from the imposition of antidumping duty orders does not render Commerce incapable of conducting investigations.

There is no structural bias operating in Commerce's administration of the dumping laws that implicates an institutional bias claim, least of all here. Commerce's decision to alert another federal agency of a potentially unfair practice under the antidumping laws is a lawful action, *see infra* n.97, that will not support a claim of institutional bias even if characterized as manifesting a bias in favor of a domestic manufacturer. Here, fairness in the administrative proceeding is safeguarded adequately by recognition of the prejudgment claim.

integrity—basically, that he or she does not prejudge investigations." *NEC Corp. v. United States*, Court No. 96-10-02360, at 8 (Mem. Op. and Order on Pl.'s Mot. for Prelim. Inj., Mar. 21, 1997).

A public position on a policy issue is not disqualifying; nor is prior knowledge of adjudicative facts. *See Hortonville Joint School Dist. No. 1 v. Hortonville Educational Assn.*, 426 U.S. 482, 493, 96 S. Ct. 2308, 2314 (1976) ("Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker. . . . Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'") (quoting *United States v. Morgan*, 313 U.S. 409, 421, 61 S. Ct. 999, 1004 (1941)) (citations omitted).

A general claim of agency viewpoint or policy bias is not actionable. *See, e.g., FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968) (*Cinderella I*), (refusing to enjoin Federal Trade Commission from conducting hearing on plaintiff's alleged unfair trade practices notwithstanding the Commission's pre-hearing issuance of a press release stating the Commission had found "reason to believe" that the law had been violated). *See also Withrow*, 421 U.S. at 58, 95 S. Ct. at 1470 ("The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation."). Thus, the Assistant Secretary's preliminary opinion on whether imports are being dumped cannot alone support disqualification. The antidumping statute contemplates that a decisionmaker will make up his or her mind over the

course of the administrative process, starting from a viewpoint at the initiation of the investigation, "there may be dumping," and leading to a conclusion upon issuance of the final determination, "there is dumping," or "there is no dumping." *NEC Corp. v. United States*, 958 F. Supp. 624, 629 (CIT 1997).

As noted above, the Assistant Secretary for Import Administration is the decisionmaker for antidumping investigations. *See supra* pp. 10. The Assistant Secretary, of course, cannot make every decision in every case.[91] The sheer volume of data, the technical nature of the issues in complex cases, and the large number of proceedings (investigations and reviews) require the Assistant Secretary to rely heavily upon the recommendations and assistance of the investigation team and other import administration[92] and Commerce Department

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[91] *See* Esserman Dep., Hr'g Exs. And Docs., Vol. 4, Tab 70 at 185.

[92] The Director for Policy and Analysis within the Office of the Assistant Secretary is the principal advisor to the Assistant Secretary on administrative and management policy for Import Administration. Department of Commerce Organization and Function Order 41-1 at § 2.03. This responsibility includes addressing disputed issues of methodology. In addition, the Director oversees the day-to-day operations of the Office of Accounting, the Office of Policy, and the Central Records Unit. *Id.* The Director of Policy and Analysis reports directly to the Assistant Secretary for Import Administration. UF ¶ 63, Pretrial Order at 23.

The Office of Accounting provides accounting/financial policy guidance in the administration of the Antidumping and Countervailing Duty laws, provides accounting and financial support for cost-accounting issues related to the cost of production and constructed value analyses, and also provides expert advice and position papers to the office of the Assistant Secretary. Department of Commerce Organization and Function Order 41-1 § at 2.03b. In this capacity, the Director of the Office of Accounting and his staff address accounting and methodological issues that can significantly impact the outcome of an antidumping case. UF ¶ 65, Pretrial Order at 24.

staff.[93] Despite their influence in antidumping investigations, the independently formed opinions of Import Administration staff are not relevant to the prejudgment cause of action recognized here. Import Administration staff must communicate their recommendations to their superiors as part

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The Office of Policy serves as the principal staff in the formulation and implementation of policies governing the Department's administration of the Antidumping and Countervailing Duty statutes. Department of Commerce Organization and Function Order 41-1 at § 2.03a. In consultation with the Office of the Chief Counsel for Import Administration, the Office of Policy is responsible to ensure that the AD law is administered consistent with Congressional intent and is responsible to ensure the uniform application of statutory and regulatory provisions of the AD/CVD laws and regulations. *Id.* In this capacity, the Director of the Office of Policy and his staff address interpretations of the AD statute and regulations. UF ¶ 64, Pretrial Order at 23-24.

The Office of the Chief Counsel for Import Administration is charged with providing legal services to the Import Administration. In this capacity, the Chief Counsel for Import Administration and his staff address interpretations of the AD laws and regulations and renders advice on various legal decisions that may have a significant impact on the outcome of an antidumping case. Moreover, the Chief Counsel for Import Administration reports directly to the General Counsel. Department of Commerce Organization Order 10-06 at § 2.02. Within the Office of the Chief Counsel for Import Administration, there is at least one attorney and a supervising attorney assigned to each antidumping proceeding conducted by Import Administration. UF ¶ 67, Pretrial Order at 25.

[93] For example, the General Counsel "is the chief law officer of the Department, and legal advisor to the Secretary, the Under Secretaries, the Assistant Secretaries, and other officers of the Department, including operating heads." Department of Commerce Organization Order 10-6 at § 3.01. The functions of the Office of General Counsel for the Department of Commerce include "the preparation or review of pleadings, briefs, memoranda, and other legal documents necessary in proceedings involving the Department, or requested by any other Government agency for use in proceedings." Department of Commerce Organization Order 10-06 at § 4.01c. The General Counsel reports directly to the Secretary of Commerce. *Id.* at § 2.01.

of their official duties; these recommendations are not final, however important they may be, and cannot lead to a showing that the mind of the Assistant Secretary for Import Administration, the decisionmaker in antidumping investigations, is closed. *See NEC Corp. v. United States*, 958 F. Supp. 624, 635-36 (CIT 1997) (citing *Corning Savings & Loan Assn. v. Federal Home Loan Bank Bd.*, 571 F. Supp. 396, 404 (E.D. Ark. 1983), *aff'd*, 736 F.2d 479 (8th Cir. 1984)).[94] For similar reasons the opinions of officials from other agencies are also not relevant to NEC's prejudgment claim. *Id.* at 635.

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[94] The opinions of career staff about an investigation are not relevant for a prejudgment cause of action, and therefore, not discoverable. Nevertheless, outcome directives from the Assistant Secretary for Import Administration to Import Administration staff prior to initiation of an investigation are potentially discoverable, assuming there is an actual risk of prejudgment present. *See, e.g., NEC Corp. v. United States*, 958 F. Supp. 624, 636 (CIT 1997) ("the Court is allowing discovery [of a staff member] solely on the question of directives he has received from superiors with respect to the outcome of the supercomputer investigation.").

Antidumping proceedings are not adjudicatory[95] but investigatory, *see* H.R. Rep. No. 96-317, at 77 (1979); S. Rep. No. 96-249, at 100 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 486. *See also Budd Co. v. United States* 1 C.I.T. 67, 72; 507 F. Supp. 997, 1001 (1980) ("Congress has recognized that the administrative proceedings under Title VII of the Tariff Act of 1930 are investigatory, not adjudicatory."), with statutorily prescribed procedures: a final determination in which the Department must articulate and substantiate its decisionmaking, *see* 19 U.S.C. § 1677f(i) (3) (A) (1994); an opportunity to submit factual information and

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[95] *See* 19 U.S.C. § 1677c(b) ("The hearing shall not be subject to the provisions of subchapter II of chapter 5 of title 5 [defining administrative procedures], or to section 702 of such title."). The D.C. Circuit requires recusal of a decisionmaker in an adjudicatory administrative proceedings

> where 'a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.' *Cinderella Career and Finishing Schools, Inc., v. FTC*, 138 U.S. App. D.C. 152, 160, 425 F.2d 583, 591 (1970). In other words, we will set aside a commission member's decision not to recuse himself from his duties only where he has "demonstrably made up [his] mind about important and specific factual questions and [is] impervious to contrary evidence."

Metropolitan Council of NAACP Branches v. FCC, 310 U.S. App. D.C. 237, 247-48, 46 F.3d 1154, 1164-65 (1995) (quoting *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980, *cert. denied*, 453 U.S. 913, 101 S. Ct. 3148 (1981)). The constitutionally driven concerns of formal adjudicatory proceedings are not at issue in antidumping cases. *See* discussion *supra* p. 29.

The D.C. Circuit has articulated an even higher standard for establishing prejudgment in a rulemaking-like proceeding. *See Association of Nat'l Advert. v. FTC*, 201 U.S. App. D.C. 165, 172-84, 627 F.2d 1151, 1158-70 (1979) ("[A] Commissioner should be disqualified only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.").

legal argument, *see* 19 U.S.C. § 1677m(d)(e) (1994); 19 C.F.R. §§ 353.31(2), 353.38(2) (1996); an opportunity to argue important issues at a hearing, *see* 19 U.S.C. § 1677c (1994); 19 C.F.R. § 353.58(b) (1996); and an opportunity for judicial review of the final determination to insure Commerce's decision is supported by substantial evidence and in accordance with law. *See* 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a(a) (2)(B)(i), 1516a (b) (1) (B) (i).

While these procedures must not be rendered nugatory by prejudgment, at the same time, any claim of prejudgment must be circumscribed to ensure that the administrative process is not disrupted. Thus, the claim recognized by the Court precludes only conduct by the decisionmaker that will render the statutory procedures a hollow formality.

Under this statutory scheme, a plaintiff must demonstrate more than the appearance of prejudgment to disqualify a decisionmaker. A plaintiff must show from the conduct and statements of the decisionmaker[96] that the outcome of the investigation had already been determined and that plaintiff's participation in the administrative process would be futile.

In addition, the presumption of honesty and integrity operating in favor of administrative decisionmakers coupled with the considerable process Congress has codified in the antidumping statute requires clear and convincing proof for the court to conclude that the process has actually been undermined by prejudgment. *See Association of Nat'l Adver. v. FTC*, 201 U.S. App. D.C. 165, 172-84, 627 F.2d 1151, 1158-70 (1979) ("The 'clear and convincing' test is necessary to rebut the presumption of administrative regularity.").

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[96] The focus is on the conduct and statements of the decisionmaker and not his or her mental processes to avoid a potentially unwarranted intrusion into legitimate executive department functioning. *See* cases cited *infra* n. 97.

NEC has an added burden in the present case because a new decisionmaker replaced the Assistant Secretary under whose command the predecisional analysis and letter were prepared and disseminated. Furthermore, as noted above, *supra* 11-12, Acting Assistant Secretary Robert LaRussa has had only a cursory involvement with the matters in dispute here. NEC's burden is twofold: first, to demonstrate that Mr. LaRussa's predecessor prejudged the investigation, and second, that by virtue of that prejudgment, Mr. LaRussa's decisional independence is constrained in a way that precludes a fair investigation.

Applying the standard articulated above to the facts of this case, the risk of prejudgment arose from Import Administration's rendering advice to another federal agency prior to initiation of a formal dumping investigation.[97] The

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[97] NEC challenges Commerce's authority to advise another federal agency about possible dumping, contending that the transmittal of the predecisional memorandum to NSF was *ultra vires*. Commerce does have the authority to undertake a predecisional dumping analysis to decide whether to self-initiate an antidumping investigation. *See* 19 U.S.C. § 1673a(a) (1); *see, e.g., Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan*, 50 Fed. Reg. 41,450 (Dep't Commerce 1985) (init. antidumping duty invest.); *Certain Softwood Lumber Products from Canada*, 56 Fed. Reg. 56,055 (Dep't Commerce 1991) (self-initiation countervailing duty invest.). Having the responsibility and expertise for administration of the antidumping laws and being the "master" of those laws, *Daewoo Elecs. Co. v. International Union*, 6 F.3d 1511, 1516 (Fed. Cir. 1993) (citing *Consumer Prods. Div., SCM Corp v. Silver Reed Am., Inc.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985)), Commerce here had the authority to share its analysis with another federal agency confronted with a dumping issue. NSF has no experience with the antidumping law, but it believed the dumping issue was potentially relevant given that the procurement was governed by standards that discourage "noncompetitive practices." *See supra* at pp. 12, 15-6; Commerce's transmittal of its analysis to NSF was consistent with the "general presumption that information obtained by one Federal

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Government agency is to be freely shared among Federal Government agencies." *Inter-Departmental Disclosure of Information Submitted Under The Shipping Act of 1984* 9 Op. OLC 48, 53 (Feb. 8, 1985).

NEC further asserts that Commerce's actions were nevertheless *ultra vires* on the ground that when the Predecisional Memorandum was prepared Commerce's real motivation was not to analyze self-initiation but to prevent the UCAR procurement of NEC supercomputers. Hence, NEC seeks to litigate, as a factual matter, Commerce's motivation for the preparation of the Joffe letter and the Predecisional Memorandum. The Court ruled at the pretrial conference that it would not decide this issue. To inquire into the motivation of an otherwise lawful activity and probe the mind of government officials would represent an unwarranted intrusion into legitimate executive department functioning. Because the Court concluded that it is lawful for the ITA to prepare a predecisional dumping analysis and share it with another federal agency confronting a dumping issue, inquiry into ITA's motivation would intrude inappropriately into an executive official's decision-making process. *See, e.g., United States v. Morgan*, 313 U.S. 409, 422 (1941); *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229 (1947) ("'The devil himself knoweth not the mind of man,' and a modern reviewing court is not much better equipped to lay bare unexposed mental processes."); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995); *Bacon v. Department of Housing and Urban Dev.*, 757 F.2d 265, 269-70 (Fed. Cir. 1985).

The Court stated at the pretrial conference that "the outstanding factual question to be resolved is whether the dissemination of the predecisional analysis and accompanying explanations about its contents compromise the Department's ability to conduct the pending antidumping investigation. . . . the Court recognizes that advice had been rendered and, subsequently, the UCAR procurement was put on hold. . . the Court must determine whether the advice and the manner in which it was given would render a decisionmaker reluctant or unable to reach a result contrary to the initial advice. Thus, while [the Court] will not allow inquiry into the decisionmaker's motivations or thought process, [the Court] will allow inquiry into the practical consequences of the predecisional advice on the ultimate determination." Tr. Pre-Trial Conf. at 5-6, April 7, 1997, Ct. Doc. # 155.

advice was first given orally by Ms. Esserman[98] at the May 13th interagency meeting with representatives from NSF, and subsequently reduced to writing at NSF's request with the result being the Joffe letter and the Predecisional Memorandum.

The Predecisional Memorandum and Joffe letter do not in and of themselves establish prejudgment. The letter is not definitive: Commerce "*estimated*" that NEC's bid to supply UCAR was below cost, and that the dumping margin on NEC's UCAR bid "is *likely* to be very high," and that UCAR's acquisition of NEC supercomputers "*could* have a serious adverse impact on the domestic industry's efforts to develop a more advanced version of the supercomputer system to be supplied."[99] *See Cinderella I*, 404 F.2d at 1315 (addressing the issue of whether the FTC's issuance of press releases stating that the Commission had "reason to believe" that the law had been violated constituted prejudgment, the court rejected the contention that issuance of the press releases, in and of themselves, placed Commission members "under a very real pressure to vindicate themselves and justify their charges.").

The Predecisional Memorandum is not definitive either. It was based only on information available to the Department at the time it was prepared.[100] It was not based on NEC's actual sales and cost data that would be used for the preliminary and final determinations, assuming NEC participated in the

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[98] Although no longer the Assistant Secretary for Import Administration at the time of the meeting, Ms. Esserman remained the Department's principal spokesperson on the UCAR issue.

[99] Hr'g Exs. and Docs., Vol. 1, Tab 14.

[100] The information used included U.S. Government information estimating NEC's costs, the Thorndyke Study, and information from NEC financial statements. UF ¶ 26, Pretrial Order at 14.

investigation. With different data from completed questionnaire responses, the results of the actual investigation could be different. *See* Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol 2, Tab 38 at 2233-236.

The Predecisional Memorandum includes costs for Research and Development ("R & D") in its calculation of estimated dumping margins.[101] NEC argues that this indicates prejudgment of the critical methodological issue in the investigation.[102] The Court does not agree. In the formal investigation, NEC would be free to argue, in its case brief and at a hearing, its position on R & D expenses. *See, e.g., FTC v. Cement Institute*, 333 U.S. 683, 701, 68 S. Ct. 793, 803 (1948) ("Here, . . . , members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities."). The Court cannot conclude that the procedures for argument and submission of factual information on R & D expenses were rendered meaningless by the Predecisional Memorandum. If anything, their meaning was only amplified as NEC became aware of the Department's preliminary thinking on a key methodological question.

The allegation in NEC's complaint that presented an actionable claim necessitating trial was contained in paragraph 24, which stated, "Commerce representatives repeatedly stated [at interagency meetings] that the NEC supercomputers were

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[101] *see* Hr'g Exs. And Docs., Vol. 1, Tab 15 at 2

[102] *See* Pls.' Post-Trial Memo. at 64-66, Ct. Doc. # 187

being offered to UCAR at less than fair value."[103] Through the course of the litigation, it became apparent to the Court that the critical event in NEC's prejudgment claim was the May 13th meeting when Commerce discussed its preliminary analysis of NEC's bid with representatives from NSF, and at which the alleged statements from paragraph 24 of the Complaint would have been made. It is to the substance of the May 13th meeting that the Court now turns.

During the May 13th meeting Ms. Esserman explained the structure and operation of the antidumping statute and presented the Department's preliminary analysis of NEC's UCAR bid.[104]

Mr. McPhee, the Director of Commerce's Office of Computers and Business Equipment within the Office of Trade Development,[105] had prepared proposed "Talking Points" for the May 13th interagency meeting.[106] Mr. McPhee's draft "Talking Points" contained the following "Summary of Antidumping Findings: Based on a comparison of NEC's bid price to its estimated cost of production . . . we find that dumping is occurring at significant levels, ranging

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[103] Compl. ¶ 24, Ct. Doc. # 2.

[104] Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol 2, Tab 38 at 152-53, 225-228; Tr. Eleanor Lewis Trial Test. at 117-20, Ct. Doc. # 177; Tr. Powell Trial Test. at 168, 188-192, Ct. Doc. # 177; Powell Dep., Hr'g Exs. and Docs., Vol. 4, Tab 72 at 10.

[105] The Office of Trade Development is separate and distinct from the office of Import Administration although both offices are within the International Trade Administration. *See* U.S. Department of Commerce Organizational Chart, Hr'g Exs. and Docs., Vol. 1, Tab Z.

[106] McPhee Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 79; Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol 2, Tab 38 at 39.

from approximately 100-300 percent."[107] Mr. McPhee's source for the percentage estimates was the Department's predecisional analysis.[108]

Ms. Esserman reviewed Mr. McPhee's "Talking Points," concluded that they were inappropriate,[109] and did not use them for her presentation at the May 13th meeting,[110] although they were in her possession.[111] At the meeting, Ms. Esserman indicated that based on the preliminary analysis the NEC bid could result in substantial dumping margins, ranging from 100-300%.[112]

In response to questions from NSF about the likely outcome of the administrative proceedings, Ms. Esserman indicated that a dumping finding and an injury determination by the ITC could be made and successfully upheld.[113]

This statement can be interpreted two ways. NEC posits that it demonstrates prejudgment of the antidumping investigation. Alternatively, it can be read as a prediction of a possible outcome. The wisdom of making such a statement

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[107] Pls.' Exs. 2 & 9, Hr'g Exs. and Docs., Vol. 1, Tabs 2 & 9.

[108] McPhee Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 80-1.

[109] Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol 2, Tab 38 at 42-49.

[110] *Id.*; McPhee Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 79. *See also* Tr. Eleanor Lewis Trial Test. at 120-122, Ct. Doc. # 177.

[111] *See* Tr. Taverman Trial Test. at 288, Ct. Doc. # 178.

[112] Tr. Rudolph Trial Test. at 375; 440-42; 444-45, Ct. Doc. # 179.

[113] *Id.* at 375, 444-5; see also Mr. Rudolph's contemporaneous notes of the meeting and those of Mr. Correll, who was also in attendance, Pls.' Exs. 30 & 31, Hr'g Exs. and Docs., Vol. 1, Tabs 30 & 31.

can certainly be questioned, especially if issued by a superior in the presence of persons who would staff a future investigation. The risk is that the statement becomes a self-fulfilling prophecy. In this instance, however, the evidence does not support such a conclusion. The statement was preliminary and advisory. Mr. Rudolph, NSF's general counsel who attended the May 13th meeting, testified that Ms. Esserman qualified her belief in the dumping finding as "based on the preliminary analysis as understood to date."[114] Ms. Esserman's statement also was made with sensitivity to the existing data and to the forthcoming administrative process which could alter the result. Ms. Esserman testified at the preliminary injunction hearing that the procedure of an antidumping investigation, and its ultimate conclusion in a final determination, would be based on an entirely different data base that would include the foreign producer's actual data.[115] She also testified at length about the transparent procedures required in the administrative process which could alter the result.[116]

Weighing all the evidence, the Court finds that Ms. Esserman was providing advice in the nature of a forecast rather than prejudging the outcome of the investigation. Consequently, the Court cannot conclude that Ms. Esserman's statement so constrained Mr. LaRussa as to lead to a pre-determined result.

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[114] Tr. Rudolph Trial Test. at 444-45, Ct. Doc. # 179.

[115] Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol 2, Tab 38 at 235-237.

[116] *Id.* at 235-6.

CONCLUSION

For the foregoing reasons, plaintiffs' application for a permanent injunction is denied. Judgment will be entered accordingly.

/s/ Donald C. Pogue

Donald C. Pogue, Judge

Dated: August 20, 1997
New York, New York

UNITED STATES COURT
OF INTERNATIONAL TRADE

NEC CORPORATION and
HNSX SUPERCOMPUTERS, INC.,

Plaintiffs,

v.

UNITED STATES and DEPARTMENT
OF COMMERCE, *et al.*,

Defendants,

and

CRAY RESEARCH, INC.,

Defendant-Intervenor.

BEFORE: Pogue, Judge

Court No. 96-10-02360

JUDGMENT

This case having been duly submitted for decision, after trial and upon due deliberation, the Court having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED plaintiffs' application for a permanent injunction is denied, and final judgment is entered for defendant.

/s/ Donald C. Pogue
Donald C. Pogue, Judge

Dated: August 20, 1997
New York, New York

APPENDIX C

THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service and time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.